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THE

# TRYAL

OF

## *John Peter Zenger,*

OF

## *NEW-YORK,* PRINTER,

Who was lately Try'd and Acquitted for PRINTING and PUBLISHING a LIBEL againſt the Government.

With the PLEADINGS and ARGUMENTS on both Sides.

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*Ita* CUIQUE *eveniat, ut de* REPUBLICA *meruit.* [Cicero.]

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The FOURTH EDITION.

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*London:* Printed for J. WILFORD, behind the Chapter-Houſe, St. *Paul's* Church-Yard. 1738.

THE

# TRYAL

OF

## John Peter Zenger,

OF

## NEW-YORK PRINTER.

A BRIEF

# NARRATIVE

OF THE

## CASE *and* TRYAL *of* JOHN PETER ZENGER, *Printer of the* NEW-YORK *Weekly Journal.*

AS there was but one Printer in the Province of *New-York*, that printed a publick News Papers, I was in Hopes, if I undertook to publiſh another, I might make it worth my while; and I ſoon found my Hopes were not groundleſs: y firſt Paper was printed, *Nov. 5th*, 1733. and I continued printing and publiſhing of them, I thought to the Satisfaction of every Body, till the *January* following; when the Chief Juſtice was pleaſed to animadvert upon the Doctrine of Libels, in a long Charge given in that Term to the Grand Jury, and afterwards on the third *Tueſday* of *October*, 1734. was again pleaſed to charge the Grand Jury in the following Words:

'*Gentlemen*; I ſhall conclude with reading a 'Paragraph or two out of the ſame Book, con- 'cerning Libels; they are arrived to that Height, 'that they call loudly for your Animadverſion; 'it is high Time to put a Stop to them; for at 'the rate Things are now carried on, when all 'Order and Government is endeavoured to be 'trampled on; Reflections are caſt upon Perſons 'of all Degrees, muſt not theſe Things end in 'Sedition, if not timely prevented? Lenity, you 'have ſeen, will not avail, it becomes you then 'to enquire after the Offenders, that we may in 'a due Courſe of Law be enabled to puniſh them. 'If you, *Gentlemen*, do not interpoſe, conſider 'whether the ill Conſequences that may ariſe 'from any Diſturbances of the publick Peace, 'may not in part lye at your Door?

'*Hawkins*, in his Chapter of Libels, conſi- 'ders three points. *1ſt. What ſhall be ſaid to be 'a Libel. 2dly. Who are liable to be puniſhed for 'it. 3dly, In what Manner they are to be puniſhed.* 'Under the *1ſt.* he ſays, §. 7. *Nor can there be 'any Doubt, but that a Writing, which defames a 'private Perſon only, is as much a Libel as that 'which defames Perſons intruſted in a publick Capa- 'city, in as much as it manifeſtly tends to create ill 'Blood, and to cauſe a Diſturbance of the publick 'Peace; however, it is certain, that it is a very 'high Aggravation of a Libel, that it tends to ſcan- 'dalize the Government, by reflecting on thoſe who 'are entruſted with the Adminiſtration of publick 'Affairs, which does not only endanger the publick 'Peace, as all other Libels do, by ſtirring up the 'Parties immediately concerned in it, to Acts of 'Revenge, but alſo has a direct Tendency to breed in 'the People a Diſlike of their Governors, and incline 'them to Faction and Sedition.* As to the *2d.* Point he ſays, §. 10. *It is certain, not only he 'who compoſes or procures another to compoſe it, but 'alſo that he who publiſhes, or procures another to 'publiſh it, are in Danger of being puniſhed for it; 'and it is ſaid not to be material, whether he who 'diſperſes a Libel, knew any Thing of the Contents or*

' *Effects of it or not; for nothing could be more easy* ' *than to publish the most virulent Papers with the* ' *greatest Security, if the concealing the Purport of* ' *them from an illiterate Publisher, would make him* ' *safe in the dispersing them; Also, it has been said,* ' *that if he who hath either read a Libel himself,* ' *or hath heard it read by another, do afterwards* ' *Maliciously read or report any Part of it in the Pre-* ' *sence of others, or lend or shew it to another, he is* ' *guilty of an unlawful Publication of it. Also, it* ' *hath been holden, that the Copying of a Libel shall* ' *be a conclusive Evidence of the Publication of it,* ' *unless the Party can prove, that he delivered it to* ' *a Magistrate to examine it, in which Case the Act* ' subsequent *is said to explain the Intention* prece-' dent. *But it seems to be the better Opinion, that* ' *he who first writes a Libel, dictated by another, is* ' *thereby guilty of Making of it, and consequently* ' *punishable for the bare Writing; for it was no* ' *Libel till it was reduced to Writing.*

' These, *Gentlemen*, are some of the Offences ' which are to make Part of your Enquiries; ' and if any other should arise in the Course of ' your Proceedings, in which you are at a Loss, ' or conceive any Doubts, upon your Application ' here, We will assist and direct you.

The Grand Jury not indicting me as was expected, the Gentlemen of the Council proceeded to take my Journals into Consideration, and sent the following Message to the general Assembly.

' *Die Jovis*, 3 *ho.* P. M. 17*th of October*, 1734.

' A Message from the Council by *Philip Cort-* ' *landt*, in these Words, to *wit*,

' That Board having had several of *Zenger*'s *New-York Weekly Journals* laid before them, ' and other scurrilous Papers, tending to alienate ' the Affections of the People of this Province ' from his Majesty's Government, to raise Sedi-' tions and Tumults among the People of this ' Province, and to fill their Minds with a Con-' tempt of His Majesty's Government: And con-' sidering the pernicious Consequences that may ' attend such growing Evils, if not speedily and ' effectually put a Stop to. And conceiving that ' the most likely Method to put a Stop to such ' bold and seditious Practices, to maintain the ' Dignity of His Majesty's Government, and to ' preserve the Peace thereof, would be by a Con-' ference between a Committee of this Board, ' and a Committee of the Assembly; It is there-' fore ordered, That the Gentlemen of this Board, ' NOW ASSEMBLED, or any seven of them, ' be a Committee, to join a Committee of the ' House of Representatives, in order to confer ' together, and to examine and enquire into the ' said Papers, and the Authors and Writers ' thereof.

' Which Message being read.

' *Ordered*, That the Members of this House, ' or any fourteen of them, do meet a Committee ' of the Council, at the Time and Place therein ' mentioned.

1 *Die Veneris*, 9 *ho.* A. M. 18 *October*, 1734.

' Mr. *Garretson*, from the Committee of this ' House, reported, That they last Night met the ' Committee of the Council, on the subject Mat-' ter of their Message of yesterday to this House; ' and that after several Preliminaries between the ' said Committees, the Gentlemen of the Council ' reduced to Writing, what they requested of ' this House, and delivered the same to the ' Chairman, who delivered it in at the Table, and ' being read, is in the Words following.

' At a Committee of the Council held the 17*th* of *October*, 1734.

PRESENT.

Mr. *Clarke*. Mr. *Harrison*. Dr. *Colden*.
Mr. *Livingston*. Mr. *Kennedy*. Mr. Chief Justice.
Mr. *Cortlandt*. Mr. *Lane*. Mr. *Horsmanden*.

' *Gentlemen*;

' The Matters we request your Concurrence ' in, are, That *Zenger*'s Papers, No. 7. 47. 48. ' 49. which were read, and which we now deli-' ver, be burnt by the Hands of the common ' Hangman, as containing in them many Things ' derogatory of the Dignity of His Majesty's ' Government, reflecting upon the Legislature, ' upon the most considerable Persons, in the most ' distinguished Stations in the Province, and tend-' ing to raise Seditions and Tumults among the ' People thereof.

' That you concur with us in the Addressing ' the Governour, to issue His Proclamation, ' with a Promise of Reward for the Discovery of ' the Authors or Writers of these Seditious Libels.

' That

'That you concur with us in an Order for 'Profecutting the Printer thereof.

'That you concur with us in an Order to the 'Magiſtrates, to exert themſelves in the Execu- 'tion of their Offices, in order to preſerve the 'publick Peace of the Province.

'*By Order of the Committee.*
*Fred. Morris*, Cl. Con.

'Mr. *Garretſon* delivered likewiſe to the Houſe 'the ſeveral Papers referred to in the ſaid 'Requeſt.

'*Ordered*, That the ſaid Papers be lodg'd 'with the Clerk of this Houſe, and that the 'Conſideration thereof, and the ſaid Requeſt, be 'referred till *Tueſday* next.

'*Die Martis*, 9 *ho.* A. M. 22 *October*. 1734.

'The Houſe according to Order proceeded to 'take into Conſideration the Requeſt of a Com- 'mittee of Council, delivered to a Commitee of 'this Houſe, on the 16*th* Inſtant, as likewiſe of 'the ſeveral Papers therein referred to. And 'after ſeveral Debates upon the ſubject Matters, 'it was *ORDERED*, THAT THE SAID PA- 'PERS AND REQUEST LYE ON THE 'TABLE.'

The Council finding the General Aſſembly would not do any Thing about it, they ſent the following Meſſage to the Houſe.

'*Die Sabbati*, 9 *ho.* A. M. 2 *November*, 1734.

'A Meſſage from the Council by Mr. *Living- 'ſton*, deſiring this Houſe to return by him to 'that Board, the ſeveral ſeditious Journals of '*Zenger*'s, No. 7. 47. 48 49. which were deli- 'vered by a Committee of that Board to a Com- 'mittee of this Houſe, the 17*th* of *October* laſt, 'together with the Propoſals of the Committee 'of that Board, delivered therewith to a Com- 'mittee of this Houſe; and then withdrew.'

On *Tueſday* the 5*th* of *November*, 1734. the *Quarter Seſſions* for the City of *New-York* began, when the Sheriff delivered to the Court AN ORDER, which was read in theſe Words.

'At a Council held at Fort *George*, in *New-York*, the 2*d* of *November*, 1734.

PRESENT.

His Excellency *William Coſby*, Capt. General and Governor in Chief, *&c.*
Mr. *Clarke*. Mr. *Harriſon*. * Dr. *Colden*.
Mr. *Livingſton*. Mr. *Kennedy*. Mr. Chief Juſtice.
Mr. *Cortlandt*. Mr. *Lane*. Mr. *Horſmanden*.

'*Whereas by an Order of this Board, of this 'Day, ſome of* John Peter Zenger's *Journals, 'entitled*, The New-York Weekly Journal, con- 'taining the freſheſt Advices, foreign and domeſ- 'tic, No. 7. 47. 48. 49. *were ordered to be burnt 'by the Hands of the common Hangman, or Whip- 'per, near the Pillory in this City, on* Wedneſday '*the* 6th *Inſtant, between the Hours of Eleven and 'Twelve in the Forenoon, as containing in them 'many Things tending to Sedition and Faction, to 'bring His Majeſty's Government into Contempt, 'and to diſturb the Peace thereof, and containing in 'them likewiſe, not only Reflections upon His Excel- 'lency the Governor in particular, the Legiſlature in 'general, but alſo upon the moſt conſiderable Perſons 'in the moſt diſtinguiſhed Stations in this Province. 'It is therefore ordered, That the Mayor, and Magi- 'ſtrates of this City, do attend at the Burning of 'the ſeveral Papers or Journals aforeſaid, Num- 'bered as above mentioned.*

*Fred. Morris*, D. Cl. Con.

'To *Robert Lurting*, Eſq; Mayor of the City 'of *New-York*, and the Reſt of the Magiſtrates 'for the ſaid City and County.

Upon reading of which ORDER, the Court forbad the Entring thereof in their Books at that Time, and many of them declared, that if it ſhould be entred, they would have their Proteſt entred againſt it.

On *Wedneſday* the 6*th* of *November*, the Sher- riff of *New-York* moved the Court of *Quarter Seſſions*, to comply with the ſaid Order, upon which one of the Aldermen offered a Proteſt, which was read by the Clerk, and approved of by all the Aldermen, either expreſsly or by not objecting to it, and is as followeth.

'Whereas an ORDER has been ſerved on this Court, in theſe Words.

[*The Order as above inſerted.*]

'And

*N.B. *Dr.* Colden *was that Day at* Eſopus, 90 *Miles from* New-York, *tho' mention'd as preſent in Council*

'And whereas this Court conceives, they are 'only to be commanded by the King's Mandatory Writs, authorized by Law, to which they 'conceive they have the Right of ſhewing Cauſe 'why they don't obey them, if they believe them 'improper to be obey'd, or by ORDERS, which 'have ſome known Laws to authorize them; and 'whereas this Court conceives THIS ORDER to 'be no Mandatory Writ warranted by Law, 'nor 'knows of no Law that authorizes the making 'the Order aforeſaid; ſo they think themſelves 'under no Obligation to obey it: Which Obedi-'ence, they think, would be in them, an open-'ing a Door for arbitrary Commands, which, 'when once opened, they know not what dan-'gerous Conſequences may attend it. Where-'fore this Court conceives itſelf bound in Duty '(for the Preſervation of the Rights of this Cor-'poration, and as much as they can, the Liberty 'of the Preſs, and the People of the Province, 'ſince an Aſſembly of the Province, and ſeveral 'Grand Juries, have refuſed to meddle with the 'Papers, when applied to by the Council) *to pro-'teſt againſt the ORDER aforeſaid, and to forbid 'all the Members of this Corporation, to pay any 'Obedience to it,* until it be ſhewn to this Court, 'that the ſame is Authorized by ſome known 'Law, which they neither know nor believe 'that it is.'

Upon reading of which, it was required of the Honourable *Francis Harriſon*, Recorder of this Corporation, and one of the Members of the Council, (preſent at making the ſaid Order) to ſhew by what Law or Authority the ſaid ORDER was made; upon which he ſpoke in Support of it, and cited the Caſe of Doctor *Sacheverel*'s Sermon, which was by the Houſe of Lords ordered to be burnt by the Hands of the Hangman, and that the mayor and Aldermen of *London* ſhould attend the doing of it. To which one of the Aldermen anſwered to this Purpoſe; That he conceived the Caſe was no ways parallel, becauſe Doctor *Sacheverel*, and his Sermon, were impeached by the Houſe of Commons of *England*, which is the Grand Jury of the Nation, and Repreſentative of the whole People of *England*: That this their Impeachment they proſecuted before the Houſe of Lords, the greateſt Court of Juſtice of *Britain*, and which beyond Memory of Man, has had Cognizance of Things of that Nature, that there *Sacheverel* had a fair Hearing in Defence of himſelf and of his Sermon. And after that fair Hearing, he and his Sermon were juſtly, fairly, and legally condemned; that he had read the Caſe of Dr *Sacheverel*, and thought he could charge his Memory, that the Judgment of the Houſe of Lords in that Caſe was, That the mayor and Sheriffs of *London* and *Middleſex*, only ſhould attend the Burning of the Sermon, and not the Aldermen; and farther he remembred, that the Order upon that Judgment, was only directed to the Sheriffs of *London*, and not even to the Mayor, who did not attend the doing it; and farther ſaid, that would Mr. Recorder ſhew, that the Governour and Council had ſuch Authority as the Houſe of Lords, and that the Papers ordered to be burnt were in like manner legally proſecuted and condemned, there the Caſe of Doctor *Sacheverel* might be to the Purpoſe; but without ſhewing that, it rather proved that a Cenſure ought not to be pronounced, till a fair Trial by a competent and legal Authority were firſt had. Mr. Recorder was deſired to produce the Books from whence he cited his Authorities, that the Court might judge of them themſelves, and was told, that if he could produce ſufficient Authorities to warrant *this ORDER*, they would readily obey it, but otherwiſe not. Upon which he ſaid, he did not carry his Books about with him. To which it was anſwer'd, he might ſend for them, or order a Conſtable to fetch them. Upon which he aroſe, and at the lower End of the Table he mentioned, That Biſhop *Burnet*'s Paſtoral Letter, was order'd by the Houſe of Lords, to be burnt by the High Bailiff of *Weſtminſter* *; upon which he abruptly went away, without waiting for an Anſwer, or promiſing to bring his Books, and did not return ſitting the Court.

After Mr. Recorder's Departure, it was moved that the *Proteſt* ſhould be enter'd, to which it was anſwer'd, that the *Proteſt* could not be entered without entering alſo the ORDER, and it was not fit to take any Notice of IT, and therefore it was propos'd that no Notice ſhould be taken in their Books of either, which was unanimouſly agreed to by the Court.

The Sheriff then moved, that the Court would direct their Whipper to perform the ſaid ORDER, to

* *Bp.* Kennet *ſays, That this Letter ſeem'd to be ſacrific'd to a poor Jeſt on the Author's Name* [Burnet] *Compleat Hiſt of* Eng. *Vol.* 3. *P.* 587. 2 *Ed. in* Lond. 1719.

to which it was answered, That as he was the Officer of the Corporation, they would give no such *Order*. Soon after which the Court adjourned, and did not attend the Burning of the Papers. Afterwards about Noon, the Sheriff, after reading the Numbers of the several Papers which were ordered to be burnt, delivered them unto the Hands of his own Negroe, and ordered him to put them into the Fire, which he did, at which Mr. Recorder, *Jeremiah Dunbar*, Esq; and several of the Officers of the Garrison attended.

On the Lord's Day the 17*th* of *November*, 1734. I was taken and imprisoned by Virtue of a Warrant in these Words.

'At a Council held at Fort *George* in *New-York*, the 2*d* Day of *November*, 1734.

PRESENT,

His Excellency *William Cosby*, Captain General and Governour in Chief, &c.

Mr. *Clarke*, Mr. *Harrison*. Mr. *Livingston*. Mr. *Kennedy*. Chief Justice. Mr. *Cortlandt*. Mr. *Lane*. Mr. *Hosmanden*.

'It is ordered that the Sheriff for the City of 'New-York, do forthwith take and apprehend 'John Peter Zenger, for printing and publishing 'several Seditious Libels, dispersed throughout 'his Journals or News Papers, entituled, *The 'New-York Weekly Journal, containing the freshest 'Advices, foreign and domestick*; as having in them 'many Things, tending to raise Factions and 'Tumults, among the People of this Province, 'inflaming their Minds with Contempt of His 'Majesty's Government, and greatly disturbing 'the Peace thereof, and upon his taking the said 'John Peter Zenger, *to commit him to the Prison 'or common Jail of the said City and County.*

Fred. Morris, *D. Cl. Con.*

And being by Virtue of that Warrant so imprisoned in the Jail, I was for several Days denied the use of Pen, Ink and Paper, and the Liberty of Speech with any Persons. ——— Upon my Commitment, some Friends soon got a *Habeas Corpus*, to bring me before the Chief Justice, in order to my Discharge, or being bail'd; on the Return whereof, on *Wednesday* the 20*th* of *November*, my Council delivered Exceptions to the Return, and the Chief Justice ordered them to be argued publickly at the City-Hall, on the *Saturday* following.

On *Saturday* the 23*d*. of *November*, the said Exceptions came to be argued, by *James Alexander* and *William Smith*, of Council for me, and by Mr. Attorney General and Mr. *Warrel*, of Council against me, in Presence of some Hundreds of the Inhabitants; where my Council (having the Benefit of Exception to the Illegality of the Warrant) insisted that I might be admitted to reasonable Bail. And to shew that it was my Right to be so, they offered *Magna Charta*, *The Petition of Right*, 3 Car. *The* Habeas Corpus *Act of* 31 Car. 2. which directs the Sum in which Bail is to be taken, to be, '*according to the Quality of the Prisoner, and Nature of the Offence.*' Also 2. *Hawkins*, Cap. 15. §. 5. in these Words, '*But Justices must take Care, that under Pretence 'of demanding sufficient Security, they do not make 'so excessive a Demand, as in Effect amounts to a 'Denial of Bail, for this is look'd on as a great 'Grievance, and is complained of as such, by* 1 W. & M. Sess. 2d. *by which it is declared*, That 'excessive Bail ought not to be requir'd.' It was also shewn, that the seven Bishops, who in King *James* the IId's Time, were charged with the like Crime that I stood charged with, were admitted to Bail on their own Recognizances, the Arch-Bishop in 200 *l.* and each of the other six in 100 *l.* a piece only. Sundry other Authorities and Arguments were produced and insisted on by my Council, to prove my Right to be admitted to moderate Bail, and to such Bail as was in my Power to give; and sundry Parts of History they produced, to shew how much the requiring excessive Bail had been resented by Parliament. And in order to enable the Court to judge what Surety was in my Power to give, I made Affidavit, *That (my Debts paid) I was not worth Forty Pounds, (the Tools of my Trade, and wearing Apparel excepted.)*

Some warm Expressions (to say no worse of them) were dropt on this Occasion, sufficiently known and resented by the Auditory, which for my Part I desire may be buried in Oblivion: Upon the whole it was *Ordered that I might be admitted to Bail, my self in* 400 l. *with two Sureties, each in* 200 l. *and that I should be remanded till I gave it.* And as this was Ten Times more, than was in my Power to counter-secure any Person in giving Bail for me, I conceived I could not ask any to become my Bail on these

Terms; and therefore I returned to Jail, where I lay until *Tuesday* the 28*th* of *January*, 1734-5, being the laſt Day of that Term; and the Grand Jury having found nothing againſt me, I expected to have been diſcharged from my Impriſonment: But my Hopes proved vain; for the Attorney General then charged me by *Information*, for Printing and Publiſhing Parts of my Journals No. 13 and 23. as being *falſe, ſcandalous, malicious, and ſeditious.*

To this Information my Council appeared, and offered Exceptions, leaving a Blank for inſerting the Judges Commiſſions, which the Court were of Opinion not to receive till thoſe Blanks were filled up In the ſucceeding Vacation the Judges gave Copies of their Commiſſions; and on *Tueſday* the 15*th* of *April* laſt, the firſt Day of the ſucceeding Term, my Council offered theſe Exceptions; which were as follows.

The Attorney General, *v.* *John Peter Zenger.* } On Information for a Miſdemeanour.

'Exceptions humbly offered by *John Peter Zenger*, to the Honourable *James De Lancey*, Eſq; to judge in this Cauſe.

'The Defendant comes and prays Hearing of the Commiſſions, by Virtue of which the Honourable *James De Lancey*, Eſq; claims the Power and Authority to judge in this Cauſe, and it is read to him in theſe Words;

'GEORGE *the ſecond, by the Grace of God, King of* Great Britain, France *and* Ireland, *King, Defender of the Faith*, &c. *To Our truſty and well beloved* James De Lancey, *Eſq; We, repoſing ſpecial Truſt and Confidence in your Integrity, Ability and Learning, have aſſigned, conſtituted and appointed, and We do by theſe Preſents aſſign conſtitute and appoint you, the ſaid* James De Lancey, *to be Chief Juſtice in and over our Province of* New-York, *in* America, *in the Room of* Lewis Morris, *Eſq; giving and by theſe Preſents granting unto you, full Power and lawful Authority, to hear, try, and determine all Pleas whatſoever, civil, criminal and mixt, according to the Laws, Statutes and Cuſtoms of Our Kingdom of* England, *and the Laws and Uſages of Our ſaid Province of* New-York, *not being repugnant thereto, and Executions of all Judgments of the ſaid Court to award, and to make ſuch Rules and Orders in the ſaid Court, as may be found convenient and uſeful, and as near as may be agreeable to the Rules and Orders of Our Courts of King's Bench, Common Pleas, and Exchequer in* England. *To have, hold, and enjoy the ſaid Office or Place of Chief Juſtice in and over Our ſaid Province, with all and ſingular the Rights, Privileges, Profits and Advantages, Sallaries, Fees and Perquiſites unto the ſaid Place belonging, or in any Ways appertaining, in as full and ample Manner as any Perſon heretofore Chief Juſtice of Our ſaid Province hath held and enjoyed, or of Right ought to have held and enjoyed the ſame, To you the ſaid* James De Lancey, *Eſq; for and* DURING OUR WILL AND PLEASURE. *In Teſtimony whereof we have cauſed theſe Our Letters to be made Patent, and the great Seal of Our Province of* New-York, *to be hereunto affixed. Witneſs our truſty and well beloved* WILLIAM COSBY *Eſq; Our Captain General and Governour in Chief of Our Provinces of* New-York, New-Jerſey, *and the Territories thereon depending in* America, *Vice-Admiral of the ſame, and Colonel in our Army, at Fort* George *in* New-York, *the Twenty firſt* Day *of* Auguſt, *in the ſeventh Year of Our Reign,* Annoq; Domini, 1733.

'Which being read and heard, the ſaid *John Peter Zenger*, by Proteſtation not conſeſſing nor ſubmitting to the Power of any other Perſon to judge in this Cauſe, doth except to the Power of the Honourable *James De Lancey*, Eſq; aforeſaid, to judge in this Cauſe, by Virtue of the Commiſſion aforeſaid, for theſe Reaſons, *viz.*

'1*ſt.* For that the Authority of a Judge of the King's Bench, in that Part of *Great Britain* called *England*, by which the Cognizance of this Cauſe is claimed, is by the ſaid Commiſſion granted to the Honourable *James De Lancey*, Eſq; aforeſaid, only *during Pleaſure*; whereas that Authority (by a Statue in that Caſe made and provided) ought to be granted *during good Behaviour.*

'2*d.* For that by the ſaid Commiſſion, the Juriſdiction and Authority of a Juſtice of the Court of Common Pleas at *Weſtminſter*, in that Part of *Great Britain*, called *England*, is granted to the ſaid *James De Lancey*, Eſq; which Juriſdiction and Authority, cannot be granted to, and exerciſed by, any one of the Juſtices of the King's Bench.

'3*d.* For that the Form of the ſaid Commiſſion is not founded on nor warranted by the Common Law, nor any Statute of *England*, nor of *Great Britain*, nor any Act of Aſſembly of this Colony.

'4*th.* For that it appears by the Commiſſion aforeſaid, that the ſame is granted under the Seal

' Seal of this Colony, by His Excellency *William Cosby*, Esq; Governour thereof; and it ' appears not, that the same was granted, neither ' was the same granted, by and with the Advice ' and Consent of His Majesty's Council of this ' Colony; without which Advice and Consent, ' His Excellency could not grant the same.

' Wherefore, and for many other Defects in ' the said Commission, this Defendant humbly ' hopes, that the Honourable *James De Lancey*, ' Esq; will not take Cognizance of this Cause, ' by Virtue of the Commission aforesaid.

Was signed, { *James Alexander.* / *William Smith.*

The Exceptions to the Commission of the Honourable *Frederick Phillipse*, Esq; were the same with the foregoing, including therein his Commission, which is in these Words.

' GEORGE *the second, by the Grace of* ' *God, of* Great Britain France, *and* Ireland, ' *King, Defender of the Faith*, &c. *To Our trusty* ' *and well beloved* Frederick Phillipse, *Esq*; *Greet-* ' *ing: Whereas it is Our Care, that Justice be* ' *duly administer'd to Our Subjects within Our Pro-* ' *vince of* New-York, *and Territories thereon* ' *depending in* America; *and We, reposing especial* ' *Confidence in your Integrity, Ability and Learning,* ' *have assigned, constituted and appointed, and We* ' *do by these Presents assign, constitute and appoint* ' *you, the said* Frederick Phillipse, *to be second Jus-* ' *tice of Our Supream Court of Judicature for Our* ' *Province of* New-York, *in the Room of* James ' De Lancey, *Esq*; *giving and granting with you* ' *the said* Frederick Phillipse, *full Power and* ' *Authority, with Our other Justices of Our said* ' *Supream Court, to hear, try and determine, all* ' *Pleas whatsoever, civil, criminal and mixt, accord-* ' *ing to the Laws, Statutes and Customs of Our* ' *Kingdom of* England, *and the Laws and Usages* ' *of Our said Province of* New-York, *not being* ' *repugnant thereto, and Executions of all Judg-* ' *ments of the said Court to award, and to act and* ' *do all Things, which any of Our* Justices of either ' Bench, or Baron of the Exchequer, in Our said ' Kingdom of *England, may or ought to do*; *and* ' *also to assist, in the making such Rules and Orders* ' *in Our said Court, as shall be for the Good and* ' *Benefit of Our said Province*; *and as near as con-* ' *veniently may be, to the Rules and Orders of Our-* ' *said Courts in Our said Kingdom of* England: *To* ' *have, hold and enjoy, the said Office or Place of* ' *second Justice of Our said Province of* New-York, ' *together with all and singular the Rights, Privi-* ' *leges, Sallaries, Fees, Perquisites, Profits and Ad-* ' *vantages thereto, now or at any Time heretofore* ' *belonging, or in any wise of Right appertaining,* ' *unto you the said* Frederick Phillipse, *for and* dur- ing our Pleasure. *In Testimony whereof, We have* ' *caused these our Letters to be made Patent, and the* ' *Great Seal of Our said Province of* New-York *to* ' *be hereunto affixed. Witness Our trusty and well* ' *beloved* WILLIAM COSBY, *Esq*; *Our Captain* ' *General and Governour in Chief of Our Provinces* ' *of* New-York, New-Jersey, *and Territories thereon* ' *depending in* America, *Vice Admiral of the same,* ' *and Colonel in Our Army*, &c. *at* Fort George ' *in* New-York, *the Twenty first Day of* August, ' *in the Seventh Year of Our Reign*, Annoq; Do- ' mini, 1733.

*Fred. Morris*, D. Secry.

*Tuesday* the 15*th* of *April*, 1735.

Mr. *Alexander* offered the above Exceptions to the Court, and prayed that they might be filed. Upon this the Chief Justice said to Mr. *Alexander* and Mr *Smith*, That they ought well to consider the Consequences of what they offered. To which both answered, That they had well considered what they offered, and all the Consequences. And Mr. *Smith* added, that he was so well satisfied of *the Right of the Subject to take an Exception to the Commission of a Judge, if he thought such Commission illegal*, ——— that he durst venture his Life upon *that Point*. As to *the Validity of the Exceptions* then offered, he said, he took that to be *a second Point*; but was ready to argue them both, if their Honours were pleased to hear him. To which the Chief Justice replied, That he would consider the Exceptions in the Morning; and ordered the Clerk to bring them to him.

*Wednesday*, the 16*th* of *April*, 1735.

The Chief Justice delivered one of the Exceptions to the Clerk, and Justice *Phillipse* the other, upon which Mr. *Smith* arose and asked the Judges, whether their Honours would hear him upon these two Points. 1*st*. *That the Subject has a Right to take such Exceptions, if they judged the Commission illegal.*

*gal**. *2dly. That the Exceptions tendered were legal and valid.* To which the Chief Juſtice ſaid, That they would neither hear nor allow the Exceptions; *for* (ſaid he) *you thought to have gained a great Deal of Applauſe and Popularity by oppoſing this Court, as you did the Court of Exchequer; but you have brought it to that Point, That either,* We muſt go from the Bench, or you from the Bar: *Therefore We exclude you and Mr.* Alexander *from the Bar*; and delivered a Paper to the Clerk, and ordered it to be entered, which the Clerk entered accordingly, and returned the Paper to the Chief Juſtice; after which the Chief Juſtice ordered the Clerk to read publickly what he had written; an atteſted Copy whereof follows.

At a Supream Court of Judicature held for the Province of *New-York*, at the City Hall of the City of *New-York*, on *Wedneſday*, the 16*th* Day of *April*, 1735.

PRESENT.

The Hon. *James De Lancey*, Eſq; Chief Juſtice.
The Hon. *Frederick Phillipſe*, Eſq; Second Juſtice.

'James Alexander, *Eſq*; *and* William Smith, '*Attornies of this Court, having preſumed* (notwith-'ſtanding they were forewarned by the Court of 'their DISPLEASURE if they ſhould do it) *to 'ſign, and having actually ſigned, and put into Court, 'Exceptions, in the Name of* John Peter Zenger; '*thereby denying the Legality of the Judges their 'Commiſſions*; *tho' in the uſual Form*, and the being 'of this Supream Court, *It is therefore ordered, 'that for the ſaid Contempt, the ſaid* James Alex-'ander, *and* William Smith, *be excluded from any 'farther Practice in this Court, and that their 'Names be ſtruck out of the Roll of Attornies of 'this Court.*

*per Cur'.* James Lyne, *Cl.*

After the Order of the Court was read, Mr. *Alexander* aſked whether it was the Order of Mr. Juſtice *Phillipſe* as well as of the Chief Juſtice? To which both anſwered, that it was their Order; upon which Mr. *Alexander* added, That it was proper to aſk that Queſtion, *That they might know how to have their Relief:* He farther obſerved to the Court, upon reading of the Order, That they were miſtaken in their Wording of it, becauſe the Exceptions were *only to their Commiſſions*, and *not to the being of the Court*, as is therein alledged; and prayed that the Order might be altered accordingly. The Chief Juſtice ſaid, they conceived the Exceptions were againſt the Being of the Court. Both Mr. *Alexander* and Mr. *Smith* denied that they were, and prayed the Chief Juſtice to point to the Place that contained ſuch Exceptions; and further added, That the Court might well exiſt, tho' the Commiſſions of all the Judges were void; which the Chief Juſtice confeſſed to be true: And therefore they prayed again that the Order in that Point might be altered; but it was denied.

Then Mr. *Alexander* deſired to know, whether they *over-ruled or rejected* the Exceptions; the Chief Juſtice ſaid, he did not underſtand the Difference; to which ſaid *Alexander* replied, that if he *rejected* the Exceptions then they could not appear upon the Proceedings, and in that Caſe the Defendant was entitled to have them made Part of the Proceedings, by Bills of Exceptions: But if they *over-ruled* them, then by ſo doing, they only declared them not ſufficient, to hinder them from proceeding by virtue of thoſe Commiſſions, and the Exceptions would remain as Records of the Court, and ought to be entered on the Record of the Cauſe as Part of the Proceedings. The Chief Juſtice ſaid, they muſt remain upon the File, to warrant what we have done; as to being Part of the Record of the Proceedings in that Cauſe, he ſaid, you may ſpeak to that Point to morrow.

*Fryday, April* 18*th.* 1735.

Mr. *Alexander* ſignified to the Court, That on *Wedneſday* laſt their Honours had ſaid, That the Council for *Zenger* might ſpeak to the Point, concerning the *Rejecting* or *Over-ruling* of *Zenger*'s Exceptions on the Morrow: To which the Chief Juſtice anſwered, That he ſaid, *You may get ſome Perſon to ſpeak to that Point on the Morrow, not meaning that the ſaid* Alexander *ſhould ſpeak to it, that being contrary to the Order.* Both Mr. *Alexander*

* *This firſt Point is largely treated on, in the Arguments of* Van Dam's *Council, in Support of their Plea to the Juriſdiction of the Supream Court, printed here above a Year before that, from* Pag. 14 *to* 35 *to which no Anſwer has as yet appeared; which Argument contains alſo ſome Part of the Arguments neceſſary to ſupport the* 2*d. Point.*

*under* and Mr. *Smith* said, they understood it otherwise.

They both also mentioned, that it was a Doubt, whether by the Words of the Order they were debarred of their Practice as Council, as well as Attorneys, whereas they practised in both Capacities? To which the Chief Justice answered, That the Order was plain, *That* James Alexander, *Esq*; *and* William Smith, *were debarred and excluded from their whole Practice at this Barr, and that the Order was intended to barr their acting both as Council and as Attornies, and that it could not be construed otherwise.* And it being asked Mr. *Philipse*, Whether he understood the Order so; he answered, that he did.

Upon this Exclusion of my Council I petitioned the Court to order Council for my Defence, who thereon appointed *John Chambers*, Esq; who pleaded *Not Guilty* for me to the Information. But as to the Point. *Whether my Exceptions should be part of the Record as was moved by my former Council.* Mr. *Chambers* thought not proper to speak to it; Mr. *Chambers* also moved, that a certain Day in the next Term, might be appointed for my Tryal, and for *a Struck Jury*; whereupon my Tryal was ordered to be on *Monday* the 4*th* of *August*, and the Court would consider till the first Day of next Term, whether I should have a Struck Jury or not, and ordered that the Sheriff should in the mean Time, at my Charge, return the Freeholders Book.

At a Supream Court of Judicature held for the Province of *New-York*, before the Honourable *James De Lancey*, Esq; Chief Justice of the said Province; and the Honourable *Frederick Philipse*, *Esq*; second Justice of the said Province.

On *Tuesday* the 29*th* of *July*, 1735. the Court opened, and *on Motion of Mr.* Chambers *for a Struck Jury, pursuant to the Rule of the preceding Term, the Court were of Opinion, that I was entitled to have a Struck Jury*; and that Evening at five of the Clock, some of my Friends attended the Clerk, for striking the Jury; when to their Surprize, the Clerk instead of producing the Freeholders Book, to strike the Jury out of it, in their Presence as usual, he produced a List of 48 Persons, who, he said he had taken out of the Freeholders Book; my Friends told him, that a great Number of these Persons were not Freeholders, that others were Persons holding Commissions and Offices at the Governour's Pleasure, that others were of the late displaced Magistrates of this City, who must be supposed to have Resentment against me, for what I had printed concerning them; that others were the Governour's Baker, Taylor, Shoemaker, Candlemaker, Joiner, *&c.* that as to the few indifferent Men that were upon that List, they had Reason to believe (as they had heard) that Mr. Attorney had a List of them, to strike them out; and therefore requested that he would either bring the Freeholders Book, and chuse out of it 48 unexceptionable Men in their Presence, as usual; or else, that he would hear their Objections particularly to the List he offered, and that he would put impartial Men in the Place of those against whom they could shew just Objections. Notwithstanding this, the Clerk refused to strike the Jury out of the Freeholders Book, and refused to hear any Objections to the Persons on his List, but told my Friends, if any Objections they had to any Persons, they might strike those Persons out; to which they answered, there would not remain a Jury, if they struck out all the exceptionable Men, and according to the Custom, they had only a Right to strike out 12.

But finding no Arguments could prevail with the Clerk to hear their Objections to his List, nor to strike the Jury as usual, Mr. *Chambers* told him, he must apply to the Court, which the next Morning he did, and the Court upon his Motion, *Ordered, That the* 48 *should be struck out of the Freeholders Book as usual, in the Presence of the Parties, and that the Clerk should hear Objections to Persons proposed to be of the* 48, *and allow of such Exceptions as were just.* In Pursuance of that Order, a Jury was that Evening struck, to the Satisfaction of both Parties, who my Friends and Council insisted on no Objections but *want of Freeholders*; and tho' they did not insist, that Mr. Attorney General (who was assisted by Mr. *Blagge*,) should shew any particular Cause, against any Persons he disliked, but acquiesced that *any Person he disliked* should be out of the 48.

Before *James De Lancey*, Esq; Chief Justice of the Province of *New-York*, and *Frederick Philipse*, second Judge, came on my Tryal, on the fourth Day of *August*, 1735. upon an Information for printing and publishing two News Papers, which were called Libels against our Governour and his Administration.

The Defendant *John Peter Zenger* being called appeared.

And the Sherif returned his *Venire* for the Tryal of this said Cause.

Mr. *Chambers of Council for the Defendant*, I humbly move Your Honours that we may have Juſtice done by the Sheriff, and that he may return the Names of the Jurors in the ſame Order as they were ſtruck.

Chief Juſtice. *How is that? Are they not ſo returned?*

Mr. *Ch.* No, they are not: For ſome of the Names that were laſt ſet down in the Pannel, are now placed firſt.

Ch. J. *Make out that, and you ſhall be righted.*

Mr. *Ch.* I have the Copy of the Pannel in my Hand, as the Jurors were ſtruck, and if the Clerk will produce the Original ſigned by Mr. Attorney and my ſelf, Your Honour will ſee our Complaint is juſt.

Ch. J. *Clerk, is it ſo? Look upon that Copy; is it a true Copy of the Pannel as it was ſtruck?*

*Clerk.* Yes, I believe it is,

Ch. J. *How came the Names of the Jurors to be miſplaced in the Pannel annexed to the* Venire?

*Sheriff*, I have returned the Jurors in the ſame Order in which the Clerk gave them to me.

Ch. J. *Let the Names of the Jurors be ranged in the Order they were ſtruck, agreeable to the Copy here in Court.*

Which was done accordingly. And the Jury, whoſe Names were as follows, were called and ſworn.

*Hermanus Rutgers, Stanly Holmes, Edward Man, John Bell, Samuel Weaver, Andries Marſchalk, Egbert van Borſon, Thomas Hunt,* Form. *Benjamin Hildreth, Abraham Keteltas, John Goelet, Hercules Wendover.*

Mr. Attorney General opened the Information, which was as follows.

Mr. *Attorney.* May it pleaſe Your Honours, and you Gentlemen of the Jury; the Information, now before the Court, and to which the Defendant *Zenger* has pleaded *Not Guilty*, is an Information for printing and publiſhing *a Falſe, Scandalous and Seditious Libel*, in which his Excellency the Governour of this Province, who is the King's immediate Repreſentative here, is greatly and unjuſtly ſcandalized, as a Perſon that has no Regard to Law nor Juſtice: with much more, as will appear upon reading the Informations. This of Libelling is what has always been diſcouraged as a Thing that tends to create Differences among Men, ill Blood among the People, and oftentimes great Bloodſhed between the Party Libelling and the Party Libelled. There can be no Doubt but your Gentlemen of the Jury will have the ſame ill Opinion of ſuch Practices, as the Judges have always ſhewn upon ſuch Occaſions: But I ſhall ſay no more at this Time, until you hear the Information, which is as follows.

'*New York*, Supream Court.
'Of the Term of *January*, in the Eighth Year
'of the Reign of our Sovereign Lord King
'GEORGE the ſecond, *&c.*

'*New-York*, *ſs.* BE it remembred, That *Richard Bradley*, Eſq; Attorney General of Our Sovereign Lord the King, for the Province of *New-York*, who for Our ſaid Lord the King in this Parts Proſecutes, in his own proper Perſon comes here into the Court of Our ſaid Lord the King, and for Our ſaid Lord the King gives the Court here to underſtand, and be informed, That *John Peter Zenger*, late of the City of *New-York*, Printer, (being a ſeditious Perſon, and a frequent Printer and Publiſher of falſe News and ſeditious Libels, and wickedly and maliciouſly deviſing the Government of Our ſaid Lord the King of this His Majeſty's Province of *New-York*, under the Adminiſtration of His Excellency *William Coſby*, Eſq; Captain General and Governour in Chief of the ſaid Province, to traduce, ſcandalize and vilify, and His Excellency the ſaid Governour, and the Miniſters and Officers of Our ſaid Lord the King of and for the ſaid Province to bring into Suſpicion and the ill Opinion of the Subjects of Our ſaid Lord the King reſiding within the ſaid Province) the Twenty eighth Day of *January*, in the ſeventh Year of the Reign of Our Sovereign Lord *George* the ſecond, by the Grace of God of *Great Britain*, *France* and *Ireland*, King, Defender of the Faith, *&c.* at the City of *New-York*, *did falſly, ſeditiouſly and ſcandalouſly* print and publiſh, and cauſe to be printed and publiſhed, a certain *falſe*, *malicious*, *ſeditious*, *ſcandalous* Libel, entituled, *The New-York Weekly Journal, containing the freſheſt Advices foreign and domeſtick*; in which Libel (of and concerning His Excellency the ſaid Governour, and the Miniſters and Officers of Our ſaid Lord the King, of and for the ſaid Province) among other Things therein contained are the Words '*Your Appearance* "*in Print at laſt*, gives a Pleaſure to many, tho' "moſt wiſh you had come fairly into the open "Field, and not appeared behind *Retrenchments* "made

" made of the ſuppoſed Laws againſt Libelling, " and of what other Men have ſaid and done be- " fore; theſe *Retrenchments*, Gentlemen, may " ſoon be ſhewn to you and all Men to be weak, " and to have neither Law nor Reaſon for their " Foundation, ſo cannot long ſtand you in ſtead: " Therefore, you had much better as yet leave " them, and come to what *the People of this City* " *and Province* (the City and Province of *New-* " *York* meaning) think are the Points in Queſtion " (*to wit*) *They* (the People of the City and Pro- " vince of *New-York* meaning) *think as Matters* " *now ſtand, that their* LIBERTIES *and* PRO- " PERTIES *are precarious, and that* SLAVERY " *is like to be intailed on them and their Poſterity, if* " *ſome paſt Things be not amended, and this they* " *collect from many paſt Proceedings.*' (Meaning ' many the paſt Proceedings of His Excel- ' lency of the ſaid Governour, and of the Miniſters ' and Officers of our ſaid Lord the King, of and ' for the ſaid Province.) And the ſaid Attorney ' General of our ſaid Lord the King, for Our ' ſaid Lord the King, likewiſe gives the Court ' here to underſtand and be informed, that ' the ſaid *John Peter Zenger* afterwards (*to* ' *wit*) the eighth Day of *April*, in the ſeventh ' Year of the Reign of Our ſaid Lord the ' King, at the City of *New-York* aforeſaid, ' did *falſly, ſeditiouſly and ſcandalouſly* print and ' publiſh, and cauſe to be printed and publiſhed, ' another *falſly, malicious, ſeditious, and ſcandalous* ' Libel, entitled, *The New-York Weekly Journal,* ' *containing the freſheſt Advices foreign and domeſtick.* ' In which Libel, (of and concerning the Go- ' vernment of the ſaid Province of *New-York*, ' and of and concerning His Excellency the ſaid ' Governour, and the Miniſters and Officers of ' Our ſaid Lord the King, of and for the ſaid Pro- ' vince) among other Things therein contained, " are theſe Words, *One of our Neighbours* (one of " the Inhabitants of *New-Jerſey* meaning) *being* " *in Company, obſerving the Strangers* (ſome of " the Inhabitants of *New-York* meaning) *full of* " *Complaints, endeavoured to perſwade them to re-* " *move into* Jerſey; *to which it was replied, that* " *would be leaping out of the Frying Pan into the* " *Fire; for, ſays he, we both are under the ſame* " *Governour* (His Excellency the ſaid Governour " meaning) *and your Aſſembly have ſhewn with a* " *Witneſs what is to be expected from them; one* " *that was then moving to* Penſilvania, (meaning " one that was then removing from *New-York*, " with intent to reſide at *Penſilvania*) *to which* " *Place it is reported ſeveral conſiderable Men are* " *removing* (from *New-York* meaning) *expreſſed in* " *Terms very moving, much Concern for the Cir-* " *cumſtances of* New-York (the bad Circumſtances " of the Province and the People of *New-York* " meaning) *ſeemed to think them very much owing to* " *the Influence that ſome Men* (whom he called " *Tools*) *had in the Adminiſtration* (meaning the " Adminiſtration of Government of the ſaid Pro- " vince of *New-York*) *ſaid he was now going* " *from them, and was not to be hurt by any Meaſures* " *they ſhould take, but could not help having ſome* " *Concern for the Welfare of his Country Men, and* " *ſhould be glad to hear that the Aſſembly* (meaning " the General Aſſembly of the Province of *New-* " *York*) *would exert themſelves as became them, by* " *ſhewing that they have the Intereſt of their Country* " *more at Heart, than the Gratification of any pri-* " *vate View of any of their Members, or being at* " *all affected, by the Smiles or Frowns of a Gover-* " *nour,* (His Excellency the ſaid Governour " meaning) *both which ought equally to be deſpiſed,* " *when the Intereſt of their Country is at Stake.* " *You, ſays he, complain of the Lawyers, but I* " *think the Law it ſelf is at an End,* WE (the " People of the Province of *New-York* meaning) " SEE MENS DEEDS DESTROYED, JUD- " GES ARBITRARILY DISPLACED, NEW " COURTS ERECTED, WITHOUT CON- " SENT OF THE LEGISLATURE (within " the Province of *New-York* meaning) BY " WHICH IT SEEMS TO ME, TRYALS " BY JURIES ARE TAKEN AWAY WHEN " A GOVERNOR PLEASES, (His Excellency " the ſaid Governour meaning) MEN OF " KNOWN ESTATES DENYED THEIR " VOTES, CONTRARY TO THE RE- " CEIVED PRACTICE, THE BEST EXPO- " SITOR OF ANY LAW: *Who is then in that* " *Province* (meaning the Province of *New-York*,) " *that call* (can call meaning) *any Thing his own,* " *or enjoy any Liberty* (Liberty meaning) *longer* " *than thoſe in the Adminiſtration* (meaning the " Adminiſtration of Government of the ſaid Pro- " vince of *New-York*) *will condeſcend to let them* " *do it, for which Reaſon I have left it,* (the Pro- " vince of *New York* meaning) *as I believe more* " *will.*' To the great Diſturbance of the Peace ' of the ſaid Province of *New-York*, to the Great ' Scandal of Our ſaid Lord the King, of His ' Excellency the ſaid Governor, and of all ' others concern'd in the Adminiſtration of ' the Government of the ſaid Province, and ' againſt the Peace of Our Sovereign Lord the ' King His Crown and Dignity, &c. Where- ' upon the ſaid Attorney General of Our ſaid ' Lord

'Lord the King, for Our ſaid Lord the King, prays
'the Adviſement of the Court here, in the Pre-
'miſes, and the due Proceſs of the Law, againſt
'him the ſaid *John Peter Zenger*, in this Part to
'be done, to anſwer to Our ſaid Lord the King
'of and in the Premiſes, *&c.*

'*R. Bradley*, Attorney General.

To this Information the Defendant has pleaded *Not Guilty*, and we are ready to prove it.

*Mr.* Chambers *has not been pleaſed to favour me with his Notes, ſo I cannot, for Fear of doing him Injuſtice, pretend to ſet down his Argument; But here Mr.* Chambers *ſet forth very clearly the Nature of a Libel, the great Allowances that ought to be made for what Men ſpeak or write, That in all Libels there muſt be ſome particular Perſons ſo clearly pointed out, that no Doubt muſt remain about who is meant; That he was in hopes Mr.* Attorney *would fail in his Proof, as to this Point; and therefore deſired that he would go on to examine his Witneſſes.*

Then Mr. *Hamilton*, who at the Requeſt of ſome of my Friends, was ſo kind as to come from *Philadelphia* to aſſiſt me on the Tryal, ſpoke.

Mr. *Hamilton*, May it pleaſe your Honour; I am concerned in this Cauſe on the Part of Mr. *Zenger* the Defendant. The Information againſt my Client was ſent me, a few Days before I left Home, with ſome Inſtructions to let me know how far I might rely upon the Truth of thoſe Parts of the Papers ſet forth in the Information, and which are ſaid to be libellous. And tho' I am perfectly of the Opinion with the Gentleman who has juſt now ſpoke, on the ſame Side with me, as to the common Courſe of Proceedings, I mean in putting Mr. Attorney upon proving, that my Client printed and publiſhed thoſe Papers mentioned in the Information; yet I cannot think it proper for me (without doing Violence to my own Principles) to deny the Publication of a Complaint, which I think is the Right of every free-born Subject to make, when the Matters ſo publiſhed can be ſupported with Truth; and therefore I'll ſave Mr. Attorney the Trouble of Examining his Witneſſes to that Point; and I do (for my Client) confeſs, that he both printed and publiſhed the two News Papers ſet forth in the Information, and I hope in ſo doing he has committed no Crime.

*Mr. Attorney*, Then if Your Honour pleaſes, ſince Mr. *Hamilton* has confeſſed the Fact, I think our Witneſſes may be diſcharged; we have no further Occaſion for them.

Mr. *Hamilton*, If you brought them here, only to prove the Printing and Publiſhing of theſe News Papers, we have acknowledged that, and ſhall abide by it.

*Here my Journeyman and two Sons (with ſeveral others ſubpœna'd by Mr. Attorney, to give Evidence againſt me) were diſcharged, and there was Silence in the Court for ſome Time.*

Mr. Chief Juſtice. *Well Mr. Attorney, will you proceed?*

*Mr. Attorney*, Indeed, Sir, as Mr. *Hamilton* has confeſſed the Printing and Publiſhing theſe Libels, I think the Jury muſt find a Verdict for the King; for ſuppoſing they were true, the Law ſays that they are not the leſs libellous for that; nay indeed the Law ſays, their being true is an Aggravation of the Crime.

Mr. *Hamilton*, Not ſo neither, Mr. Attorney, there are two Words to that Bargain. I hope it is not our bare Printing and Publiſhing a Paper, that will make it a Libel: You will have ſomething more to do, before you make my Client a Libeller; for the Words themſelves muſt be libellous, that is, *falſe, ſcandalous, and ſeditious*, or elſe we are not guilty.

*As Mr. Attorney has not been pleaſed to favour us with his Argument, which he read, or with the Notes of it, we cannot take upon us to ſet down his Words, but only to ſhew the Book Caſes he cited, and the general Scope of his Argument, which he drew from thoſe Authorities. He obſerved upon the Excellency, as well as Uſe of Government, and the great Regard and Reverence, which had been conſtantly paid to it, both under the Law and the Goſpel. That by Government we were protected in our Lives, Religion and Properties; and that for theſe Reaſons, great Care had always been taken to prevent every Thing that might tend to ſcandalize Magiſtrates, and others concerned in the Adminiſtration of the Government, eſpecially the ſupream Magiſtrate. And that there were many Inſtances of very ſevere Judgments, and of Puniſhments inflicted upon ſuch, as had attempted to bring the Government into Contempt; by publiſhing falſe and ſcurrilous Libels againſt it, or by ſpeaking evil and ſcandalous Words of Men in Authority; to the great Diſturbance of the publick Peace. And to ſupport this, he cited,* 5 Coke 121. *ſuppoſe it*

*ſhould*

ſhould be 125.) Wood's Inſtit. 430. 2 Lilly 168. 1 Hawkins 73. 11. 6. *From theſe Books he inſiſted, that a Libel was a malicious Defamation of any Perſon, expreſſed either in Printing or Writing, Signs or Pictures, to aſperſe the Reputation of one that is alive, or the Memory of one that is dead; if he is a private Man, the Libeller deſerves a ſevere Puniſhment, but if it is againſt a Magiſtrate or other publick Perſon, it is a greater Offence; for this concerns not only the Breach of the Peace, but the Scandal of the Government; for what greater Scandal of Government can there be, than to have corrupt or wicked Magiſtrates to be appointed by the King, to govern his Subjects under him? And a greater Imputation to the State cannot be, than to ſuffer ſuch corrupt Men to ſit in the ſacred Seat of Juſtice, or to have any Meddling in, or concerning the Adminiſtration of Juſtice: And from the ſame Books Mr. Attorney inſiſted, that whether the Perſon defamed is a private Man or a Magiſtrate, whether living or dead, whether the Libel is true or falſe, or if the Party againſt whom it is made is of good or evil Fame, it is nevertheleſs a Libel. For in a ſettled State of Government, the Party grieved ought to complain for every Injury done him, in the ordinary Courſe of the Law. And as to its Publication, the Law had taken ſo great Care of Men's Reputations, that if one maliciouſly repeats it, or ſings it, in the Preſence of another, or delivers the Libel or a Copy of it over, to ſcandalize the Party, he is to be puniſhed as a Publiſher of a Libel. He ſaid it was likewiſe evident, that Libelling was an Offence againſt the Law of God. Acts* xxiii. 5. Then ſaid *Paul*, I wiſt not, Brethren, that he was the High-Prieſt: For it is written, thou ſhalt not ſpeak Evil of the Ruler of the People. 2 *Pet.* x. 11. Deſpiſe Government, preſumptuous are they, ſelf-willed, they are not afraid to ſpeak evil of Dignities, *&c. He then inſiſted that it was clear, both by the Law of God and Man, That it was a very great Offence to ſpeak evil of, or to revile thoſe in Authority over us; and that Mr.* Zenger *had offended in a moſt notorious and groſs Manner, in ſcandalizing His Excellency our Governor, who is the King's immediate Repreſentative, and the ſupreme Magiſtrate of this Province: For can there be any Thing more ſcandalous ſaid of a Governor than what is publiſhed in thoſe Papers? Nay, not only the Governor, but both the Council and Aſſembly are ſcandalized; for there it is plainly ſaid, That* as Matters now ſtand, their Liberties and Properties are precarious, and that Slavery is like to be entailed on them and their Poſterity. *And then again Mr.* Zenger *ſays,* The Aſſembly ought to deſpiſe the Smiles or Frowns of a Governor; That he thinks the Law is at an End; That we ſee Mens Deeds deſtroyed, Judges arbitrarily diſplaced, new Courts erected, without Conſent of the Legiſlature; *And,* That it ſeems Tryals by Juries are taken away when a Governor pleaſes; That none can call any Thing their own, longer than thoſe in the Adminiſtration will condeſcend to let them do it. - - - - - - - - - - - - - - *And Mr. Attorney added, that he did not know what could be ſaid in Defence of a Man, that had ſo notoriouſly ſcandalized the Governor and principal Magiſtrates and Officers of the Government, by charging them with depriving the People of their Rights and Liberties, and taking away Tryals by Juries, and in ſhort, putting an End to the Law itſelf. - - - - If this was not a Libel, he ſaid, he did not know what was one. Such Perſons as will take thoſe Liberties with Governors and Magiſtrates, he thought, ought to ſuffer for ſtirring up Sedition and Diſcontent among the People. And concluded by ſaying, that the Government had been very much traduced and expoſed by Mr.* Zenger, *before he was taken Notice of; that at laſt it was the Opinion of the Governor and Council, that he ought not to be ſuffered to go on, to diſturb the Peace of the Government; by publiſhing ſuch Libels againſt the Governor, and the chief Perſons in the Government; and therefore they had directed this Proſecution, to put a Stop to this ſcandalous and wicked Practice, of libelling and defaming His Majeſty's Government and diſturbing His Majeſty's Peace.*

*Mr.* Chambers *then ſum'd up to the Jury, obſerving with great Strength of Reaſon on Mr. Attorney's Defect of Proof, that the Papers in the Information were* Falſe, Malicious or Seditious, *which was incumbent on him to prove to the Jury, and without which they could not on their Oaths ſay,* That they were ſo, as charged.

Mr. *Hamilton.* May it pleaſe Your Honour; I agree with Mr. Attorney, that Government is a ſacred Thing, but I differ very widely from him when he would inſinuate, that the juſt Complaints of a Number of Men, who ſuffer under a bad Adminiſtration, is libelling that Adminiſtration. Had I believed that to be Law, I ſhould not have given the Court the Trouble of hearing any Thing that I could ſay in this Cauſe. I own,

when I read the Information, I had not the Art to find out (without the Help of Mr. Attorney's *Innuendo's*) that the Governor was the Perſon meant in every Period of that News Paper; and I was inclined to believe, that they were wrote by ſome, who from an extraordinary Zeal for Liberty, had miſconſtrued the Conduct of ſome Perſons in Authority into Crimes; and that Mr. Attorney out of his too great Zeal for Power, had exhibited this Information, to correct the Indiſcretion of my Client; and at the ſame Time, to ſhew his Superiors the great Concern he had, leſt they ſhould be treated with any undue Freedom. But from what Mr. Attorney has juſt now ſaid, *to wit*, That this Proſecution was directed by the Governor and Council, and from the extraordinary Appearance of People of all Condition, which I obſerve in Court upon this Occaſion, I have Reaſon to think, that thoſe in the Adminiſtration have by this Proſecution ſomething more in View, and that the People believe they have a good deal more at Stake than I apprehended: And therefore, as it is become my Duty, to be both plain and particular in this Cauſe, I beg Leave to beſpeak the Patience of the Court.

I was in hopes, as that terrible Court, where thoſe dreadful Judgments were given, and that Law eſtabliſhed, which Mr. Attorney has produced for Authorities to ſupport this Cauſe, was long ago laid aſide, as the moſt dangerous Court to the Liberties of the People of *England* that ever was known in that Kingdom; that Mr. Attorney knowing this, would not have attempted to ſet up a Star-Chamber here, nor to make their Judgments a Precedent to us: For it is well known, that what would have been judg'd Treaſon in thoſe Days for a Man to ſpeak, I think, has ſince not only been practiſed as lawful, but the contrary Doctrine has been held to be Law.

In *Brewſter*'s Caſe, for Printing, *That the Subjects might defend their Rights and Liberties by Arms, in caſe the King ſhould go about to deſtroy them*, he was told by the Chief Juſtice that it was a great Mercy, he was not proceeded againſt for his Life; for that to ſay, the King could be reſiſted by Arms in any Caſe whatſoever, was expreſs Treaſon. And yet we ſee ſince that Time, Dr. *Sacheverell* was ſentenced in the higheſt Court in *Great-Britain*, for ſaying, *That ſuch a Reſiſtance was not lawful.* Beſides, as Times have made very great Changes in the Laws of *England*, ſo in my Opinion there is good Reaſon that Places ſhould do ſo too.

Is it not ſurpriſing to ſee a Subject, upon his receiving a Commiſſion from the King to be a Governor of a Colony in *America*, immediately imagining himſelf to be veſted with all the Prerogatives belonging to the ſacred Perſon of his Prince? And which is yet more aſtoniſhing, to ſee that a People can be ſo wild as to allow of and acknowledge thoſe Prerogatives and Exemptions, even to their own Deſtruction? Is it ſo hard a Matter to diſtinguiſh between the Majeſty of our Soveraign, and the Power of a Governor of the Plantations? Is not this making very free with our Prince, to apply that Regard, Obedience and Allegiance to a Subject which is due only to our Soveraign? And yet in all the Caſes which Mr. Attorney has cited, to ſhew the Duty and Obedience we owe to the Supreme Magiſtrate, it is the King that is there meant and underſtood, tho' Mr. Attorney is pleaſed to urge them as Authorities to prove the Heinouſneſs of Mr. *Zenger*'s Offence againſt the Governor of *New-York*. The ſeveral Plantations are compared to ſo many large Corporations, and perhaps not improperly; and can any one give an Inſtance, that the Mayor or Head of a Corporation ever put in a Claim to the ſacred Rights of Majeſty? Let us not (while we are pretending to pay a great Regard to our Prince and His Peace) make bold to transfer that Allegiance to a Subject, which we owe to our King only. What ſtrange Doctrine is it, to preſs every Thing for Law here which is ſo in *England?* I believe we ſhould not think it a Favour, at preſent at leaſt, to eſtabliſh this Practice. In *England* ſo great a Regard and Reverence is had to the Judges, * that if any Man ſtrikes another in *Weſtminſter-Hall*, while the Judges are ſitting, he ſhall loſe his Right-Hand, and forfeit his Land and Goods for ſo doing. And tho' the Judges here claim all the Powers and Authorities within this Government, that a Court of King's Bench has in *England*, yet I believe Mr. Attorney will ſcarcely ſay, that ſuch a Puniſhment could be legally inflicted on a Man for committing ſuch an Offence, in the Preſence of the Judges ſitting in any Court within the Province of *New-York*. The Reaſon is obvious; a Quarrel or Riot in *New-York* cannot poſſibly be attended with thoſe dangerous Conſequences that it might in *Weſtminſter-Hall*; nor (I hope) will it be alledged, that any Miſbehaviour to a Governor in the Plantations will, or ought to be judged of or puniſhed, as a like Undutifulneſs would be to our Soveraign. From all which, I hope Mr. Attorney will not think it proper to apply his Law-

* *C.* 3. *Inſt.* 140.

Law-Caſes (to ſupport the Cauſe of his Governor) which have only been judged, where the King's Safety or Honour was concerned. It will not be denied but that a Freeholder, in the Province of *New-York*, has as good a Right to the ſole and ſeparate Uſe of his Lands, as a Freeholder in *England*, who has a Right to bring an Action of Treſpaſs againſt his Neighbour, for ſuffering his Horſe or Cow to come and feed upon his Lands, or eat his Corn, whether incloſed or not incloſed; and yet I believe it would be looked upon as a ſtrange Attempt for one Man here to bring an Action againſt another, whoſe Cattle and Horſes feed upon his Grounds not incloſed, or indeed for eating and treading down his Corn, if that were not incloſed. Numberleſs are the Inſtances of this kind that might be given, to ſhew, that what is good Law at one Time, and in one Place, is not ſo at another Time, and in another Place; ſo that I think the Law ſeems to expect, that in theſe Parts of the World, Men ſhould take care, by a good Fence, to preſerve their Property from the Injury of unruly Beaſts. And perhaps there may be as good a Reaſon why Men ſhould take the ſame Care, to make an honeſt and upright Conduct, a Fence and Security againſt the Injury of unruly Tongues.

Mr. *Attorney*. I don't know what the Gentleman means, by comparing Caſes of Freeholders in *England* with the Freeholders here. What has this Caſe to do with Actions of Treſpaſs, or Men's Fencing their Ground? The Caſe before the Court is, whether Mr. *Zenger* is guilty of Libelling his Excellency the Governor of *New-York*, and indeed the whole Adminiſtration of the Government? Mr. *Hamilton* has confeſſed the Printing and Publiſhing, and I think nothing is plainer, than that the Words in the Information are *ſcandalous, and tend to Sedition, and to diſquiet the Minds of the People of this Province*. And if ſuch Papers are not Libels, I think it may be ſaid, there can be no ſuch Thing as a Libel.

Mr. *Hamilton*. May it pleaſe your Honour, I cannot agree with Mr. Attorney; for tho' I freely acknowledge that there are ſuch Things as Libels, yet I muſt inſiſt at the ſame time, that what my Client is charged with, is not a Libel; and I obſerved juſt now, that Mr. Attorney, in defining a Libel, made uſe of the Words, *ſcandalous, ſeditious, and tend to diſquiet the People*; but (whether with Deſign, or not, I will not ſay) he omitted the Word *falſe*.

Mr. *Attorney*. I think I did not omit the Word *falſe*: But it has been ſaid already, that it may be a Libel, notwithſtanding it may be true.

Mr. *Hamilton*. In this I muſt ſtill differ with Mr. Attorney; for I depend upon it, we are to be tried upon this Information now before the Court and Jury, and to which we have pleaded *Not Guilty*, and by it we are charged with Printing and Publiſhing *a certain falſe, malicious, ſeditious and ſcandalous Libel*. This Word *falſe* muſt have ſome Meaning, or elſe how came it there? I hope Mr. Attorney will not ſay he put it there by Chance, and I am of Opinion his Information would not be good without it. But to ſhew that it is the principal Thing, which, in my Opinion, makes a Libel, I put the Caſe, the Information had been for Printing and Publiſhing a certain *true* Libel, would that be the ſame Thing? Or could Mr. Attorney ſupport ſuch an Information by any Precedent in the *Engliſh* Law? No, the Falſhood makes the Scandal, and both make the Libel. And to ſhew the Court that I am in good Earneſt, and to ſave the Court's Time, and Mr. Attorney's Trouble, I will agree, that if he can prove the Facts charged upon us to be *falſe*, I'll own them to be *ſcandalous, ſeditious*, and a *Libel*. So the Work ſeems now to be pretty much ſhortened, and Mr. Attorney has now only to prove the Words *falſe*, in order to make us Guilty.

Mr. *Attorney*. We have nothing to prove; you have confeſſed the Printing and Publiſhing; but if it was neceſſary (as I inſiſt it is not) how can we prove a Negative? But I hope ſome Regard will be had to the Authorities that have been produced; and that ſuppoſing all the Words to be true, yet that will not help them; that Chief Juſtice *Holt*, in his Charge to the Jury, in the Caſe of *Tutchin*, made no Diſtinction, whether *Tutchin*'s Papers were *true* or *falſe*; and as Chief Juſtice *Holt* has made no Diſtinction in that Caſe, ſo none ought to be made here; nor can it be ſhewn in all that Caſe, there was any Queſtion made about their being *falſe* or *true*.

Mr. *Hamilton*. I did expect to hear, that a Negative cannot be proved; but every-body knows there are many Exceptions to that general Rule: For if a Man is charged with killing another, or ſtealing his Neighbour's Horſe; if he is innocent in the one Caſe, he may prove the Man ſaid to be killed to be really alive; and the Horſe ſaid to be ſtoln, never to have been out of his Maſter's Stable, *&c.* and this I think is proving a Negative. But we will ſave Mr. Attorney the Trouble of proving a Negative, and take the *Onus Probandi* upon ourſelves, and prove

thoſe

those very Papers that are called Libels to be *true*.

*Mr. Ch. Justice.* You cannot be admitted, Mr. *Hamilton*, to give the Truth of a Libel in Evidence. A Libel is not to be justified; for it is nevertheless a Libel that it is *true*.

Mr. *Hamilton.* I am sorry the Court has so soon resolved upon that Piece of Law; I expected first to have been heard to that Point. I have not in all my Reading met with an Authority that says, we cannot be admitted to give the Truth in Evidence, upon an Information for a Libel.

*Mr. Ch. Justice.* The Law is clear, That you cannot justify a Libel.

Mr. *Hamilton.* I own that, may it please your Honour, to be so; but with Submission I understand the Word, *justified* there, to be a Justification by Plea, as it is in the Case upon an Indictment for *Murder*, or an *Assault and Battery*; there the Prisoner cannot justify, but plead *Not Guilty:* Yet it will not be denied but he may, and always is admitted to give the Truth of the Fact, or any other Matter in Evidence, which goes to his Acquittal; as in Murder he may prove it was in Defence of his Life, his House, &c. and in Assault and Battery, he may give in Evidence, that the other Party struck first, and in both Cases he will be acquitted. And in this Sense I understand the Word *justify*, when applied to the Case before the Court.

*Mr. Ch. Justice.* I pray shew that you can give the Truth of a Libel in Evidence.

Mr. *Hamilton.* I am ready, both from what I understand to be the Authorities in the Case, and from the Reason of the Thing, to shew that we may lawfully do so. But here I beg leave to observe, That Informations for Libels is a Child, if not born, yet nursed up, and brought to full Maturity, in the Court of the Star-Chamber.

*Mr. Ch. Justice.* Mr. *Hamilton*, you'll find yourself mistaken; for in *Coke*'s *Institutes* you'll find Informations for Libels, long before the Court of Star-Chamber.

Mr. *Hamilton.* I thank Your Honour; that is an Authority I did propose to speak to by and by: But as you have mentioned it, I'll read that Authority now. I think it is in the 3 *Co. Inst.* under Title *Libel*; it is the Case of *John de Northampton* for a Letter wrote to *Robert de Ferrers*, one of the King's Privy-Council, * concerning Sir *Will. Scot*, Chief Justice, and his Fellows; but it does not appear to have been upon Information; and I have good Grounds to say it was upon Indictment, as was the Case of *Adam de Ravenfworth*, just mentioned before by Lord *Coke* under the same Title; and I think there cannot be a greater, at least a plainer Authority for us, than the Judgment in the Case of *John de Northampton*, which my Lord has set down at large. *Et quia prædictus Johannes cognovit dictam Literam per se scriptam Roberto de Ferrers, qui est de Concilio Regis, quæ litera continet in se nullam veritatem, &c.* Now Sir, by this Judgment it appears the libellous Words were utterly false, and there the Falshood was the Crime, and is the Ground of that Judgment: And is not that what we contend for? Do not we insist that the Falshood makes the Scandal, and both make the Libel? And how shall it be known whether the Words are libellous, *that is, true* or *false*, but by admitting us to prove them *true*, since Mr. Attorney will not undertake to prove them *false?* Besides, is it not against Common Sense, that a Man should be punished in the same Degree for a *true Libel* (if any such Thing could be) as for a *false one?* I know it is said, *That Truth makes a Libel the more provoking, and therefore the Offence is the greater; and consequently the Judgment should be the heavier.* Well, suppose it were so, and let us agree for once, *That Truth is a greater Sin than Falshood:* Yet as the Offences are not equal, and as the Punishment is arbitrary, *that is*, according as the Judges in their Discretion shall direct to be inflicted; is it not absolutely necessary that they should know whether the Libel is *true* or *false*, that they may by that Means be able to proportion the Punishment? For would it not be a sad Case, if the Judges, for want of a due Information should chance to give as severe a Judgment against a Man for writing or publishing a Lie, as for writing or publishing a Truth? And yet this (with Submission) as monstrous and ridiculous as it may seem to be, is the natural Consequence of Mr. Attorney's Doctrine, *That Truth makes a worse Libel than Falshood*, and must follow from his not proving our Papers to be *false*, or not suffering us to prove them to be *true*. But this is only reasoning upon the Case, and I will now proceed to shew, what in my Opinion will be sufficient to induce the Court to allow us to prove the Truth of the Words, which in the Information are called libellous. And first I think there cannot be a greater Authority for us, than the Judgment I just now mentioned in the Case of *John de Northampton*, and that was in early Times, and before the Star-Chamber came to its Fulness of Power and Wickedness: In that

* *Coke* 3. *Inst.* 174.

Judgment

Judgment, as I obſerved, the *Falſhood* of the Letter which was wrote, is aſſigned as the very Ground of the Sentence. And agreeable to this it was urged by Sir *Robert Sawyer*, * in the Tryal of the Seven Biſhops, *That the Falſity, the Malice, and Seditions of the Writing, were all Facts to be proved.* But here it may be ſaid, Sir *Robert* was one of the Biſhop's Council, and his Argument is not to be allowed for Law: But I offer it only to ſhew that we are not the firſt who have inſiſted, that to make a Writing a Libel, it muſt be *falſe*. And if the Argument of a Council muſt have no Weight, I hope there will be more a Regard ſhewn to the Opinion of a Judge, and therefore I mention the Words of Juſtice *Powel* in the ſame Tryal, where he ſays (of the Petition of the Biſhops, which was called a Libel, and upon which they were proſecuted by Information) That *to make it a Libel, it muſt be falſe and malicious, and tend to Sedition*; and declared, *as he ſaw no Falſhood or Malice in it, he was of Opinion, that it was no Libel.* Now I ſhould think this Opinion alone, in the Caſe of the King, and in a Caſe which that King had ſo much at Heart, and which to this Day has never been contradicted, might be a ſufficient Authority, to entitle us to the Liberty of proving the *Truth* of the Papers, which in the Information are called *falſe, malicious, ſeditious and ſcandalous.* If it be objected, *that the Opinion of the other three Judges were againſt him*, I anſwer, That the Cenſures the Judgments of theſe Men have undergone, and the Approbation Juſtice *Powel*'s Opinion, his Judgment and Conduct upon that Tryal, has met with, and the Honour he gained to himſelf, for daring to ſpeak Truth at ſuch a Time, upon ſuch an Occaſion, and in the Reign of ſuch a King, is more than ſufficient, in my humble Opinion, to warrant our inſiſting on his Judgment, as a full Authority to our Purpoſe, and it will lye upon Mr. Attorney to ſhew, that this Opinion has ſince that Time been denied to by Law, or that Juſtice *Powel*, who delivered it, has ever been condemend or blamed for it, in any Law-Book extant at this Day, and this I will venture to ſay, Mr. Attorney cannot do. But to make this Point yet more clear, if any Thing can be clearer, I will on our Part proceed and ſhew, that in the Caſe of Sir *Samuel Barnardiſton*, his Council, notwithſtanding he ſtood before one of the greateſt Monſters that ever preſided in an *Engliſh* Court (Judge *Jefferies*) inſiſted on the Want of Proof to the *Malice* and *ſeditious Intent* of the Author, of what was called a *Libel*. And in the Caſe of *Tutchin*, which ſeems to be Mr. Attorney's chief Authority, that Caſe is againſt him; for he was upon his Tryal put upon ſhewing the Truth of his Papers, but did not, at leaſt the Priſoner was aſked by the King's Council, whether he would ſay they were *true?* And as he never pretended, that they were true, the Chief Juſtice was not to ſay ſo. But the Point will ſtill be clearer on our Side from *Fuller*'s Caſe, *For falſly and wickedly cauſing to be printed a falſe and ſcandalous Libel, in which (amongſt other Things) were contained theſe Words.* 'Mr. Jones 'has alſo made Oath, That he paid 5000 l. 'more by the late King's Order, to ſeveral Perſons 'in Places of Truſt, that they might compleat my 'Ruin, and invalidate me for ever. Nor is this 'all; for the ſame Mr. Jones will prove by unde-'niable Witneſs and Demonſtration, that he has 'diſtributed more than 180,000 l. in Eight 'Years laſt paſt, by the French King's Order, to 'Perſons in publick Truſt in this Kingdom.' Here you ſee is a ſcandalous and infamous Charge againſt the late King; here is a Charge, no leſs than High Treaſon, againſt the *Men in public Truſt*, for receiving Money of the *French* King, then in actual War with the Crown of *Great Britain*; and yet the Court were far from bearing him down with that Star-Chamber Doctrine, *to wit, That it was no matter, whether what he ſaid was true or falſe*; no, on the contrary, Lord Chief Juſtice *Holt* aſks *Fuller, Can you make it appear, they are true? Have you any Witneſſes? You might have had* Subpœna's *for your Witneſſes againſt this Day. If you take upon you to write ſuch Things as you are charged with, it lies upon you to prove them true, at your Peril. If you have any Witneſſes, I will hear them. How came you to write thoſe Books which are not true? If you have any Witneſſes, produce them. If you can offer any Matter to prove what you have wrote, let us hear it.* Thus ſaid, and thus did, that great Man Lord Chief Juſtice *Holt*, upon a Tryal of the like Kind with ours, and the Rule laid down by him in this Caſe is, *That he who will take upon him to write Things, it lies upon him to prove them at his Peril.* Now, Sir, we have acknowledged the Printing and Publiſhing of thoſe Papers, ſet forth in the Information, and (with the Leave of the Court) agreeable to the

* *State Tryals*, Vol. 4.

*State Tryals* Vol. V. 445.

*State Tryals* Vol. V. 445.

Rule laid down by Chief Juſtice *Holt*, we are ready to prove them to be true, at our Peril.

*Mr. Ch. Juſtice.* Let me ſee the Book.

*Here the Court had the Caſe under Conſideration, a conſiderable Time, and every one was ſilent.*

*Mr. Ch. Juſt.* Mr. Attorney, you have heard what Mr. *Hamilton* has ſaid, and the Caſes he has cited, for having his Witneſſes examined, to prove the Truth of ſeveral Facts contained in the Papers ſet forth in the Information. What do you ſay to it?

*Mr. Attorney*, The Law in my Opinion is very clear; they cannot be admitted to juſtify a Libel; for, by the Authorities I have already read to the Court, it is not the leſs a Libel becauſe it is true. I think I need not trouble the Court with reading the Caſes over again; the Thing ſeems to be very plain, and I ſubmit it to the Court.

*Mr. Ch. Juſt.* Mr. *Hamilton*, the Court is of Opinion, you ought not to be permitted to prove the Facts in the Papers: Theſe are the Words of the Book, '*It is far from being a Juſtification of* '*a Libel, that the Contents therefore are true, or that* '*the Perſon upon whom it is made, had a bad Repu-* '*tation, ſince the greater Appearance there is of* '*Truth in any malicious Invective, ſo much the* '*more provoking it is.*'

Mr. *Hamilton*, Theſe are Star-Chamber Caſes, and I was in hopes, that Practice had been dead with the Court.

*Mr. Ch. Juſt.* Mr. *Hamilton*, the Court have delivered their Opinion, and we expect you will uſe us with good Manners; you are not to be permitted to argue againſt the Opinion of the Court.

Mr. *Hamilton*, With Submiſſion, I have ſeen the Practice in very great Courts, and never heard it deemed unmannerly to - - - - -

*Mr. Ch. Juſt.* After the Court have declared their Opinion, it is not good Manners to inſiſt upon a Point, in which you are over-ruled.

Mr. *Hamilton*, I will ſay no more at this Time; the Court I ſee is againſt us in this Point; and that I hope I may be allowed to ſay.

*Mr. Ch. Juſt.* Uſe the Court with good Manners, and you ſhall be allowed all the Liberty you can reaſonably deſire.

Mr. *Hamilton*, I thank Your Honour. Then Gentlemen of the Jury, it is to you we muſt now appeal, for Witneſſes, to the Truth of the Facts we have offered, and are denied the Liberty to prove; and let it not ſeem ſtrange, that I apply my ſelf to you in this Manner; I am warranted ſo to do both by Law and Reaſon. The Law ſuppoſes you to be ſummoned, *out of the Neighbourhood where the Fact is alledged to be committed*; and the Reaſon of your being taken out of the Neighbourhood is, *becauſe you are ſuppoſed to have the beſt Knowledge of the Fact that is to be tried*, And were you to find a Verdict againſt my Client, you muſt take upon you to ſay, the Papers referred to in the Information, and which we acknowledge we printed and publiſhed, are *falſe, ſcandalous and ſeditious*; but of this I can have no Apprehenſion. You are Citizens of *New-York*; you are really, what the Law ſuppoſes you to be, *honeſt and lawful Men*; and, according to my Brief, the Facts which we offer to prove were not committed in a Corner; they are notoriouſly known to be true; and therefore in your Juſtice lies our Safety. And as we are denied the Liberty of giving Evidence, to prove the Truth of what we have publiſhed, I will beg Leave to lay it down as a ſtanding Rule in ſuch Caſes, *That the ſuppreſſing of Evidence ought always to be taken for the ſtrongeſt Evidence*; and I hope it will have that Weight with you. But ſince we are not admitted to examine our Witneſſes, I will endeavour to ſhorten the Diſpute with Mr. Attorney, and to that End, I deſire he would favour us with ſome Standard Definition of a Libel, by which it may be certainly known, whether a Writing be a Libel, yea or not.

*Mr. Attorney*, The Books, I think, have given a very full Definition of a Libel; they ſay it is *in a ſtrict Senſe taken for a malicious Defamation, expreſſed either in Printing, and tending either to blacken the Memory of one who is dead, or the Reputation of one who is alive, and to expoſe him to publick Hatred, Contempt or Ridicule.* §. 2 *But it is ſaid, That in a larger Senſe the Notion of a Libel may be applied to any Defamation whatſoever, expreſſed either by Signs or Pictures, as by fixing up a Gallows againſt a Man's Door, or by painting him in a ſhameful and ignominious Manner.* §. 3. *And ſince the chief Cauſe for which the Law ſo ſeverely puniſhes all Offences of this Nature, is the direct Tendency of them to a Breach of Publick Peace, by provoking the Parties injured, their Friends and Families to Acts of Revenge, which it would be impoſſible to reſtrain by the ſevereſt Laws, were there no Redreſs from Publick Juſtice for Injuries of this kind, which of all others are moſt ſenſibly felt; and ſince the plain Meaning of ſuch Scandal, as is expreſſed by Signs or Pictures, is as obvious to common Senſe, and as eaſily underſtood*

1 *Hawk. Chap.* 73. §. 1. *& ſeq.*

*underſtood by every common Capacity, and altogether as provoking as that which is expreſſed by Writing or Printing, why ſhould it not be equally criminal?* § 4. *And from the ſame Ground it ſeemeth alſo clearly to follow, That ſuch Scandal, as is expreſſed in a ſcoffing and ironical Manner, makes a Writing as properly a Libel, as that which is expreſſed in direct Terms; as where a Writing, in a taunting Manner reckoning up ſeveral Acts of publick Charity done by one, ſays,* You will not play the Jew, nor the Hypocrite, *and ſo goes on in a Strain of Ridicule to inſinuate, that what he did was owing to his Vain-Glory; or where a Writing, pretending to recommend to one the Characters of ſeveral great Men for his Imitation, inſtead of taking Notice of what they are generally eſteemed famous for, pitched on ſuch Qualities only which their Enemies charge them with the Want of, as by propoſing ſuch a one to be imitated for his Courage, who is known to be a great Stateſman, but no Soldier, and another to be imitated for his Learning, who is known to be a great General, but no Scholar,* &c. *which Kind of Writing is as well underſtood to mean only to upbraid the Parties with the Want of theſe Qualities, as if it had directly and expreſely done ſo.*

Mr. *Hamilton*, Ay, Mr. Attorney; but what certain Standard Rule have the Books laid down, by which we can certainly know, whether the Words or the Signs are malicious? Whether they are defamatory? Whether they tend to the Breach of the Peace, and are a ſufficient Ground to provoke a Man, his Family, or Friends, to Acts of Revenge, eſpecially thoſe of the ironical ſort of Words? And what Rule have you to know when I write ironically? I think it would be hard, when I ſay, *Such a Man is a very worthy honeſt Gentleman, and of fine Underſtanding*, that therefore I meant *he was a Knave or a Fool.*

*Mr. Attorney*, I think the Books are very full; it is ſaid in 1 *Hawk. p.* 193. juſt now read, *That ſuch Scandal as is expreſſed in a ſcoffing and ironical Manner, makes a Writing as properly a Libel, as that which is expreſſed in direct Terms; as where a Writing, in a taunting Manner ſays, reckoning up ſeveral Acts of Charity done by one, ſays,* You will not play the Jew or the Hypocrite, *and ſo goes on to inſinuate, that what he did was owing to his Vain Glory,* &c. *Which Kind of Writing is as well underſtood to mean only to upbraid the Parties with the Want of theſe Qualities, as if it had directly and expreſsly done ſo.* I think nothing can be plainer or more full than theſe Words.

Mr. *Hamilton*, I agree the Words are very plain, and I ſhall not ſcruple to allow (when we are agreed that the Words are *falſe and ſcandalous, and were ſpoken in an ironical and ſcoffing Manner*, &c.) that they are really *libellous*; but here ſtill occurs the Uncertainty, which makes the Difficulty to know, what Words are *ſcandalous* and what not; for you ſay, they may be *ſcandalous, true* or *falſe*; beſides, how ſhall we know whether the Words were ſpoke in a *ſcoffing and ironical Manner*, or ſeriouſly? Or how can you know, whether the Man did not think as he wrote? For by your Rule, if he did, it is no *Irony*, and conſequently no *Libel*. But under Favour, Mr. Attorney, I think the ſame Book, and the ſame Section, will ſhew us the only Rule by which all theſe Things are to be known. The Words are theſe; *Which Kind of Writing is as well* UNDERSTOOD *to mean only to upbraid the Parties with the Want of theſe Qualities, as if they had directly and expreſsly done ſo.* Here it is plain, the Words are *ſcandalous, ſcoffing and ironical*, only as they are UNDERSTOOD, I know no Rule laid down in the Books but this, I mean, as the Words are *underſtood*.

*Mr. Ch. Juſt.* Mr. *Hamilton*, Do you think it ſo hard to know, when Words are ironical, or ſpoke in a ſcoffing Manner?

Mr. *Hamilton*, I own it may be known; but I inſiſt, the only Rule to know is, as I do or can *underſtand* them; I have no other Rule to go by, but as I *underſtand* them.

*Mr. Ch. Juſt.* That is certain. All Words are libellous or not, as they are *underſtood*. Thoſe who are to judge of the Words, muſt judge whether they *are ſcandalous* or *ironical, tend to the Breach of the Peace*, or are *ſeditious*: There can be no Doubt of it.

Mr. *Hamilton*, I thank your Honour; I am glad to find the Court of this Opinion. Then it follows that thoſe twelve Men muſt *underſtand* the Words in the Information to be *ſcandalous*, that is to ſay, *falſe*; for I think it is not pretended they are of the *ironical* Sort; and when they underſtand the Words to be ſo, they will ſay we are guilty of Publiſhing a *falſe Libel*, and not otherwiſe.

*Mr. Ch. Juſt.* No, Mr. *Hamilton*; the Jury may find that *Zenger* printed and publiſhed thoſe Papers, and leave it to the Court to judge whether they are libellous; you know this is very common; it is in the Nature of a ſpecial Verdict, where the Jury leave the Matter of Law to the Court.

Mr. *Hamilton*, I know, may it pleaſe Your Honour, the Jury may do ſo; but I do likewiſe know they may do otherwiſe. I know they have

have the Right beyond all Diſpute, to determine both the Law and the Fact, and where they do not doubt of the Law, they ought to do ſo. This of leaving it to the Judgment of the Court, *whether the Words are libellous or not*, in Effect renders Juries uſeleſs (to ſay no worſe) in many Caſes; but this I ſhall have Occaſion to ſpeak to by and by; and I will with the Court's Leave proceed to examine the Inconveniencies that muſt inevitably ariſe from the Doctrines Mr. Attorney has laid down; and I obſerve in ſupport of this Proſecution, he has frequently repeated the Words taken from the Caſe of *Libel, famoſus*, in 5 *Co.* This is indeed the leading Caſe, and to which almoſt all the other Caſes upon the Subject of Libels do refer; and I muſt inſiſt upon ſaying, That according as this Caſe ſeems to be underſtood by the Court and Mr. Attorney, it is not Law at this Day: For tho' I own it to be *baſe* and *unworthy* to ſcandalize any Man, yea, I think it is even *vilanous* to ſcandalize a Perſon of publick Character, and I will go ſo far into Mr. Attorney's Doctrine as to agree, that if the Faults, Miſtakes, nay even the Vices, of ſuch a Perſon be private and perſonal, and don't affect the Peace of the Publick, or the Liberty or Property of our Neighbour, it is *unmanly* and *unmannerly* to expoſe them either by Word or Writing. But when a Ruler of the People brings his perſonal Failings, but much more his Vices, into his Adminiſtration, and the People find themſelves affected by them, either in their Liberties or Properties, that will alter the Caſe mightily, and all the high Things that are ſaid in Favour of Rulers, and of Dignities, and upon the ſide of Power, will not be able to ſtop People's Mouths when they feel themſelves oppreſſed, I mean in a free Government. It is true in Times paſt it was a Crime to ſpeak Truth, and in that terrible Court of Star-Chamber, many worthy and brave Men ſuffered for ſo doing; and yet even in that Court, and in thoſe bad Times, a great and good Man durſt ſay, what I hope will not be taken amiſs of me to ſay in this Place, *to wit, the Practice of Informations for Libels is a Sword in the Hands of a wicked King, and an arrand Coward to cut down and deſtroy the Innocent; the one cannot, becauſe of his high Station, and the other dares not, becauſe of his Want of Courage revenge himſelf in another Manner.*

*Mr. Attorney*, Pray Mr. *Hamilton*, have a Care what you ſay, don't go too far neither, I don't like thoſe Liberties.

Mr. *Hamilton*, Sure, Mr. Attorney, you won't make any Applications; all Men agree that we are governed by the beſt of Kings, and I cannot ſee the Meaning of Mr. Attorney's Caution; my well known Principles, and the Senſe I have of the Bleſſings we enjoy under his preſent Majeſty, makes it impoſſible for me to err, and I hope, even to be ſuſpected, in that Point of Duty to my King. May it pleaſe Your Honour, I was ſaying, That notwithſtanding all the Duty and Reverence claimed by Mr. Attorney to Men in Authority, they are not exempt from obſerving the Rules of common Juſtice, either in their private or publick Capacities; the Laws of our Mother Country know no Exception. It is true, Men in Power are harder to be come at for Wrongs they do, either to a private Perſon, or to the Publick: eſpecially a Governor in the Plantations, where they inſiſt upon an Exemption from anſwering Complaints of any Kind in their own Government. We are indeed told, and it is true, they are obliged to anſwer a Suit in the King's Courts at *Weſtminſter*, for a Wrong done to any Perſon here: But do we not know how impracticable this is to moſt Men among us, to leave their Families (who depend upon their Labour and Care for their Livelihood, and carry Evidences to *Britain*, and at a great, nay, a far greater Expence than almoſt any of us are able to bear, only to proſecute a Governour for an Injury done here. But when the Oppreſſion is general, there is no Remedy even that Way: no, our Conſtitution has (bleſſed be God) given us an Opportunity, if not to have ſuch Wrongs redreſſed, yet by our Prudence and Reſolution we may in a great Meaſure prevent the committing of ſuch Wrongs, by making a Governour ſenſible that it is his Intereſt to be juſt to thoſe under his Care; for ſuch is the Senſe that Men in General (I mean Freemen) have of common Juſtice, that when they come to know, that a chief Magiſtrate abuſes the Power with which he is intruſted, for the Good of the People, and is attempting to turn that very Power againſt the Innocent, whether of high or low Degree, I ſay, Mankind in general ſeldom fail to interpoſe, and as far as they can, prevent the Deſtruction of their Fellow Subjects. And has it not often been ſeen (and I hope it will always be ſeen) that when the Repreſentatives of a free People are by juſt Repreſentations or Remonſtrances made ſenſible of the Sufferings of their Fellow-Subjects, by the Abuſe of Power in the Hands of a Governour, they have declared (and loudly too) that they were not obliged by any Law to ſupport a Governour who goes about to deſtroy a Province or Colony, or their Priviledges, which by His majeſty he was appointed,

appointed, and by the Law he is bound to protect and encourage. But I pray it may be considered of what Use is this mighty Priviledge, if every Man that suffers must be silent? And if a Man must be taken up as Libeller, for telling his Sufferings to his Neighbour? I know it may be answer'd, *Have you not a Legislature? Have you not a House of Representatives, to whom you may complain?* And to this I answer, We have. But what then? Is an Assemby to be troubled with every Injury done by a Governour? Or are they to hear of nothing but what those in the Administration will please to tell them? Or what Sort of a Tryal must a Man have? And how is he to be remedied; especially if the Case were, as I have known it to happen in *America* in my Time; That a Governour who has Places (I will not say Pensions, for I believe they seldom give that to another which they can take to themselves) to bestow, and can or will keep the same Assembly (after he has model'd them so as to get a Majority of the House in his Interest) for near *twice Seven Years* together? I pray, what Redress is to be expected for an honest Man, who makes his Complaint against a Governour to an Assembly, who may properly enough be said, to be made by the same Governour against whom the Complaint is made? The Thing answers it self. No, it is natural, it is a Priviledge, I will go farther, it is a Right which all Freemen claim, and are entitled to complain when they are hurt; they have a Right publickly to remonstrate the Abuses of Power, in the strongest Terms, to put their Neighbours upon their Guard, against the Craft or open Violence of Men in Authority, and to assert with Courage the Sense they have of the Blessings of Liberty, the Value they put upon it, and their Resolution at all Hazards to preserve it, as one of the greatest Blessings Heaven can bestow. And when a House of Assembly, composed of honest Freemen, sees the general Bent of the Peoples Inclinations, That is it which must and will (I'm sure it ought to) weigh with a Legislature, in Spite of all the Craft, Carressing and Cajoling, made use of by a Governour, to divert them from hearkening to the Voice of their Country. As we all very well understand the true Reason, why Gentlemen take so much Pains and make such great Interest to be appointed Governours, so is the Design of their Appointment not less manifest. We know his Majesty's gracious Intentions to his Subjects; he desires no more than that his People in the Plantations should be kept up to their Duty and Allegiance to the Crown of *Great Britain*, that Peace may be preserved amongst them, and Justice impartially administred that we may be governed so as to render us useful to our Mother Country, by encouraging us to make and raise such Commodities as may be useful to *Great Britain*. But will any one say, that all or any of these good Ends are to be effected, by a Governour's setting his People together by the Ears, and by the Assistance of one Part of the People to plague and plunder the other? The Commission which Governours bear, while they execute the Powers given them, according to the Intent of the Royal Grantor, expressed in their Commissions, requires and deserves very great Reverence and Submission; but when a Governour departs from the Duty enjoyned him by his Sovereign, and acts as if he was less accountable than the Royal Hand that gave him all that Power and Honour which he is possessed of; this sets People upon examining and enquiring into the Power, Authority, and Duty of such a Magistrate, and to compare those with his Conduct, and just as far as they find he exceeds the Bounds of his Authority, or falls short in doing impartial Justice to the People under his Administration, so far they very often, in return, come short in their Duty to such a Governour. For Power alone will not make a Man beloved, and I have heard it observed, That the Man who was neither good nor wise before his being made a Governour, never mended upon his Preferment, but has been generally observed to be worse: For Men who are not endued with Wisdom and Virtue, can only be kept in Bounds by the Law; and by how much the further they think themselves out of the Reach of the Law, by so much the more wicked and cruel they are. I wish there were no Instances of the Kind at this Day. And wherever this happens to be the Case of a Governour, unhappy are the People under his Administration, and in the End he will find himself so too; for the People will neither love him nor support him. I make no Doubt but there are those here, who are zealously concerned for the Success of this Prosecution, and yet I hope they are not many, and even some of those, I am perswaded (when they consider what Lengths such Prosecutions may be carried, and how deeply the Liberties of the People may be affected by such Means) will not all abide by their present Sentiments; I say, *Not All:* For the Man who from an Intimacy and Acquaintance with a Governour has conceived a personal Regard for him, the Man who has felt none of the Strokes of his Power, the

Man who believes that a Governour has a Regard for him and confides in him, it is natural for ſuch Men to wiſh well to the Affairs of ſuch a Governour; and as they may be Men of Honour and Generoſity, may, and no Doubt will, wiſh him Succeſs, ſo far as the Rights and Priviledges of their Fellow Citizens are not affected. But as Men of Honour, I can apprehend nothing from them; they will never exceed that Point. There are others that are under ſtronger Obligations, and thoſe are ſuch, as are in ſome Sort engaged in Support of a Governour's Cauſe, by their own or their Relations Dependance on his Favour, for ſome Poſt or Preferment: ſuch Men have what is commonly called Duty and Gratitude, to influence their Inclinations, and oblige them to go his Lengths. I know Men's Intereſts are very near to them, and they will do much, rather than forgoe the Favour of a Governour, and a Livelihood at the ſame Time; but I can with very juſt Grounds hope, even from thoſe Men, whom I will ſuppoſe to be Men of Honour and Conſcience too, that when they ſee, the Liberty of their Country is in Danger, either by their Concurrence, or even by their Silence, they will, like *Engliſhmen*, and like themſelves, freely make a Sacrifice of any Preferment or Favour rather than be acceſſary to deſtroying the Liberties of their Country, and entailing Slavery upon their Poſterity. There are indeed another ſet of Men, of whom I have no Hopes, I mean ſuch, who lay aſide all other Conſiderations, and are ready to joyn with Power in any Shape, and with Many an or Sort of Men, by whoſe Means or Intereſt they may be aſſiſted to gratify their Malice and Envy, againſt thoſe whom they have been pleaſed to hate; and that for no other Reaſon, but becauſe they are Men of Abilities and Integrity, or at leaſt are poſſeſſed of ſome valuable Qualities far ſuperiour to their own. But as Envy is the Sin of the Devil, and therefore very hard, if at all, to be repented of, I will believe there are but few of this deteſtable and worthleſs Sort of Men, nor will their Opinions or Inclinations have any Influence upon this Tryal. But to proceed: I beg Leave to inſiſt, That the Right of complaining or remonſtrating is natural; and the Reſtraint upon this natural Right is the Law only, and that thoſe Reſtraints can only extend to what is *falſe*: For as it is Truth alone which can excuſe or juſtify any Man for complaining of a bad Adminiſtration, I as frankly agree, that nothing ought to excuſe a Man who raiſes a falſe Charge or Accuſation, even againſt a private Perſon, and that no manner of Allowance ought to be made to him, who does ſo againſt a publick Magiſtrate. *Truth* ought to govern the whole Affair of Libels, and yet the Party accuſed runs Riſque enough even then; for if he fails of proving every Titt'e of what he has wrote, and to the Satisfaction of the Court and Jury too, he may find to his Coſt, that when the Proſecution is ſet on Foot by Men in Power, it ſeldom wants Friends to favour it. And from thence (it is ſaid) has ariſen the great Diverſity of Opinions among Judges, about what Words were or were not ſcandalous or libellous. I believe it will be granted, that there is not greater Uncertainty in any Part of the Law, than about Words of Scandal; it would be miſpending of the Court's Time to mention the Caſes; they may be ſaid to be numberleſs; and therefore the utmoſt Care ought to be taken in following Precedents; and the Times when the Judgments were given, which are quoted for Authorities in the Caſe of Libels, are much to be regarded. I think it will be agreed, That ever ſince the Time of the Star-Chamber, where the moſt arbitrary and deſtructive Judgments and Opinions were given, that ever an *Engliſhman* heard of, at leaſt in his own Country: I ſay, Proſecutions for Libels ſince the Time of that arbitrary Court, and until the glorious Revolution, have generally been ſet on Foot at the Inſtance of the Crown or its Miniſters; and it is no ſmall Reproach to the Law, that theſe Proſecutions were too often and too much countenanc'd by the Judges, who held their Places at Pleaſure, (a diſagreeable Tenure to any Officer, but a dangerous one in the Caſe of a Judge.) To ſay more to this Point may not be proper. And yet I cannot think it unwarrantable, to ſhew the unhappy Influence that a Sovereign has ſometimes had, not only upon Judges, but even upon Parliaments themſelves.

It has already been ſhewn, how the Judges differed in their Opinions about the Nature of a Libel, in the Caſe of the ſeven Biſhops. There you ſee three Judges of one Opinion, that is, of a wrong Opinion, in the Judgment of the beſt Men in *England*, and one Judge of a right Opinion. How unhappy might it have been for all of us at this Day, if that Jury had underſtood the Words in that Information as the Court did? Or if they had left it to the Court, to judge whether the Petition of the Biſhops was or was not a Libel? No! they took upon them, to their immortal

Honour,

Honour, to determine both *Law* and *Fact*, and to *underſtand* the Petition of the Biſhops *to be no Libel, that is, to contain no Falſhood nor Sedition*, and therefore found them *Not Guilty*. And remarkable is the Caſe of Sir *Samuel Barnardiſton*, who was fined 10,000 *L.* for Writing a Letter, in which, it may be ſaid, none ſaw any Scandal or Falſhood but the Court and Jury; for that Judgment was afterwards looked upon as a cruel and deteſtable Judgment, and therefore was reverſed by Parliament. Many more Inſtances might be given of the Complaiſance of Court-Judges, about thoſe Times and before; but I will mention only one Caſe more, and that is the Caſe of Sir *Edward Hales*, who tho' a *Roman Catholick*, was by King *James* II. preferred to be a Colonel of his Army, notwithſtanding the Statute of 25 *Cha. 2d. Chap.* 2. by which it is provided, *That every one that accepts of an Office, Civil or Military, &c. ſhall take the Oaths, ſubſcribe the Declaration, and take the Sacrament, within three Months, &c. otherwiſe he is diſabled to hold ſuch Office, and the Grant for the ſame to be null and void, and the Party to forfeit* 500 *l.* Sir *Edward Hales* did not take the Oaths or Sacrament, and was proſecuted for the 500 *l.* for exerciſing the Office of a Colonel by the Space of three Months, without conforming as in the Act is directed. Sir *Edward* pleads, *That the King by His Letters Patents did diſpenſe with his taking the Oaths and Sacrament, and ſubſcribing the Declaration, and had pardoned the Forfeiture of* 500 *l.* And *whether the King's Diſpenſation was good, againſt the ſaid Act of Parliament?* was the Queſtion. I ſhall mention no more of this Caſe, than to ſhew how in the Reign of an arbitrary Prince, where Judges hold their Seats at Pleaſure, their Determinations have not always been ſuch as to make Precedents of, but the contrary; and ſo it happened in this Caſe where it was ſolemnly judged, *That, notwithſtanding this Act of Parliament, made in the ſtrongeſt Terms, for Preſervation of the Proteſtant Religion, That yet the King had, by his Royal Prerogative, a Power to diſpenſe with that Law*; and Sir *Edward Hales* was acquitted by the Judges accordingly. So the King's Diſpenſing Power, being by the Judges ſet up above the Act of Parliament, this Law, which the People looked upon as their chief Security againſt Popery and Arbitrary Power, was by this Judgment rendred altogether ineffectual. But this Judgment is ſufficiently expoſed by Sir *Edward Atkins*, late one of the Judges of the Court of Common Pleas in his *Enquiry into the King's Power of diſpenſing with pœnal Statutes*; where witiſhen, *Who it was that firſt invented Diſpenſations; how they came into* England; *what ill Uſe has been made of them there; and all this principally owing to the Countenance given them by the Judges.* He ſays of the Diſpenſing Power, * *The Pope was the Inventor of it; our Kings have borrowed it from them; and the Judges have from Time to Time nurſed and dreſſed it up, and given it Countenance; and it is ſtill upon the Growth, and encroaching, 'till it has almoſt ſubverted all Law, and made the Regal Power abſolute if not diſſolute.* This ſeems not only to ſhew how far Judges have been influenced by Power, and how little Caſes of this Sort, where the Prerogative has been in Queſtion in former Reigns, are to be relied upon for Law: But I think it plainly ſhews too, that a Man may uſe a greater Freedom with the Power of his Sovereign and the Judges in *Great Britain*, than it ſeems he may with the Power of a Governour in the Plantations, who is but a Fellow-Subject. Are the Words with which we are charged, like theſe? Do Mr. *Zenger's* Papers contain any ſuch Freedoms with his Governour or his Council, as Sir *Edward Atkins* has taken, with the Regal Power and the Judges in *England?* And yet I never heard of any Information brought againſt him for theſe Freedoms.

Sir *Edw. Atkins's* Enquiry into the Power of Diſpenſing with pœnal Statutes.

* Poſtſcript to the *Enquiry, pag.* 51.

If then upon the whole there is ſo great an Uncertainty among Judges (learned and great Men) in Matters of this Kind; If Power has had ſo great an Influence on Judges, how cautious ought we to be in determining by their Judgments, eſpecially in the Plantations, and in the Caſe of Libels? There is Hereſy in Law, as well as in Religion, and both have changed very much; and we well know that it is not two Centuries ago that a Man would have been burnt as an Heretick, for owning ſuch Opinions in Matters of Religion as are publickly wrote and printed at this Day. They were fallible Men, it ſeems, and we take the Liberty not only to differ from them in religious Opinions, but to condemn them and their Opinions too; and I muſt preſume, that in taking theſe Freedoms in thinking and ſpeaking about Matters of Faith or Religion, we are in the right: For, tho' it is ſaid there are very

very great Liberties of this Kind taken in *New-York*, yet I have heard of no Information prefered by Mr. Attorney for any Offences of this Sort. From which I think it is pretty clear, That in *New-York* a Man may make very free with his God, but he muſt take ſpecial Care what he ſays of his Governour. It is agreed upon by all Men that this is a Reign of Liberty, and while Men keep within the Bounds of Truth, I hope they may with Safety both ſpeak and write their Sentiments of the Conduct of Men in Power, I mean of that Part of their Conduct only, which affects the Liberty or Property of the People under their Adminiſtration; were this to be denied, then the next Step may make them Slaves. For what Notions can be entertained of Slavery, beyond that of ſuffering the greateſt Injuries and Oppreſſions, without the Liberty of complaining; or if they do, to be deſtroyed, Body and Eſtate, for ſo doing.

It is ſaid, and inſiſted upon by Mr. Attorney, *That Government is a ſacred Thing; That it is to be ſupported and reverenced; It is Government that protects our Perſons and Eſtates; That prevents Treaſons, Murders, Robberies, Riots, and all the Train of Evils that overturns Kingdoms and States, and ruins particular Perſons; and of thoſe in the Adminiſtration, eſpecially the Supream Magiſtrate, muſt have all their Conduct cenſured by private Men, Government cannot ſubſiſt.* This is called *a Licentiouſneſs not to be tollerated.* It is ſaid, *That it brings the Rulers of the People into Contempt, and their Authority not be regarded, and ſo in the End the Laws cannot be put in Execution.* Theſe I ſay, and ſuch as theſe, are the general Topicks inſiſted upon by Men in Power, and their Advocates. But I wiſh it might be conſidered at the ſame Time, how often it has happened, that the Abuſe of Power has been the primary Cauſe of theſe Evils, and that it was the Injuſtice and Oppreſſion of theſe great Men, which has commonly brought them into Contempt with the People. The Craft and Art of ſuch Men is great, and who, that is the leaſt acquainted with Hiſtory or Law, can be ignorant of the ſpecious Pretences, which have often been made uſe of by Men in Power, to introduce arbitrary Rule, and deſtroy the Liberties of a free People. I will give two Inſtances; and as they are Authorities not to be denied, nor can be miſunderſtood, I preſume they will be ſufficient.

The *firſt* is the Statute of 3*d.* of *Hen.* 7. *Cap.* 1. The Preamble of the Statute will prove all, and more than I have alledged. It begins, '*The King Our Sovereign Lord remembereth how by unlawful Maintenances, giving of Liveries, Signs and Tokens, &c. untrue Demeanings of Sheriffs in making of Pannels, and other untrue Returns, by taking of Money, by Injuries, by great Riots and unlawful Aſſemblies; the Policy and good Rule of this Realm is almoſt ſubdued; and for the not puniſhing theſe Inconveniences, and by Occaſion of the Premiſſes, little or nothing may be found by Inquiry, &c. to the Increaſe of Murders, &c. and Unſureties of all Men living, and Loſſes of their Lands and Goods.*' Here is a fine and ſpecious Pretence for introducing the Remedy, as it is called, which is provided by this Act; *that is,* inſtead of being lawfully accuſed by 24 good and lawful Men of the Neighbourhood, and afterwards tried by 12 like lawful Men, here is a Power given to the Lord Chancellor, Lord Treaſurer, the Keeper of the King's privy Seal, or two of them, calling to them a Biſhop, a temporal Lord, and other great Men mentioned in the Act, (who, it is to be obſerved, were all to be Dependants on the Court) to receive Information againſt any Perſon for any of the Miſbehaviours recited in that Act, and by their Diſcretion to examine, and to puniſh them according to their Demerit.

The ſecond Statute I propoſed to mention, is the 11*th* of the ſame King, *Chap.* 3*d.* the Preamble of which Act has the like fair Pretences as the former; *for the King calling to his Remembrance the good Laws made againſt the receiving of Liveries, &c. unlawful Extortions, Maintenances, Embracery, &c. unlawful Games, &c. and many other great Enormities, and Offences committed againſt many good Statutes, to the Diſpleaſure of Almighty God, which,* the Act ſays, *could not, nor yet can, be conveniently puniſhed by the due Order of the Law, except it were firſt found by 12 Men, &c. which, for the Cauſes aforeſaid, will not find nor yet preſent the Truth.* And therefore the ſame Statute directs, *that the Juſtices of Aſſize, and Juſtices of the Peace, ſhall upon Information for the King before them made, have full Power, by their Diſcretion, to hear and determine all ſuch Offences.* Here are two Statutes that are allowed to have given the deepeſt Wound to the Liberties of the People of *England* of any that I remember to have been made, unleſs it may be ſaid, that the Statute made in the Time of *Henry* 8*th,* by which his Proclamations were to have the Effect of Laws, might in its Conſequence be worſe.

worſe. And yet we ſee the plauſible Pretences found out by the great Men to procure theſe Acts. And it may juſtly be ſaid, that by thoſe Pretences the People of *England* were cheated or aw'd into the Delivering up their antient and ſacred Right of Tryals by Grand and Petit Juries. I hope to be excuſed for this Expreſſion, ſeeing my Lord *Coke* calls 4. *Inſt.* it *unjuſt and ſtrange Act, that tended in its Execution to the great Diſpleaſure of Almighty God, and the utter Subverſion of the common Law.*

Theſe, I think, make out what I alledged, and are flagrant Inſtances of the Influence of Men in Power, even upon the Repreſentatives of a whole Kingdom. From all which I hope it will be agreed, that it is a Duty which all good Men owe to their Country, to guard againſt the unhappy Influence of ill Men when intruſted with Power, and eſpecially againſt their Creatures and Dependents, who, as they are generally more neceſſitous, are ſurely more covetous and cruel. But it is worthy of Obſervation, that tho' the Spirit of Liberty was born down and oppreſſed in *England* at that time, yet it was not loſt; for the Parliament laid hold of the firſt Opportunity to free the Subject from the many inſufferable Oppreſſions and Outrages committed upon their Perſons and Eſtates by Colour of theſe Acts, the laſt of which being deemed the moſt grievous, was repealed in the firſt year of *Hen. 8th.* Tho' it is to be obſerved, that *Hen. 7th*, and his Creatures, reap'd ſuch great Advantages by the grievous Oppreſſions and Exactions, *grinding the Faces of the poor Subjects*, as my Lord *Coke* ſays, by Colour of this Statute by Information only, that a Repeal of this Act could never be obtained during the Life of that Prince. The other Statute being the favourite Law for Supporting arbitrary Power, was continued much longer. The Execution of it was by the great Men of the Realm; and how they executed it, the Senſe of the Kingdom, expreſſed in the *7th* of *Charles 1ſt.* (by which the Court of Star-Chamber, the Soil where Informations grew rankeſt) will beſt declare. In that Statute *Magna Charta*, and the other Statutes made in the Time of *Edw. 3d.* which, I think, are no leſs than five, are particularly enumerated as Acts, by which the Liberties and Privileges of the People of *England* were ſecured to them, againſt ſuch oppreſſive Courts as the Star-Chamber and others of the like Juriſdiction. And the Reaſon aſſigned for their pulling down the Star-Chamber, is, *That the Proceedings, Cenſures and Decrees of the Court of Star-Chamber, even though the great Men of the Realm, nay, and a Biſhop too* (holy Man) *were Judges, had by Experience been found to be an intolerable Burthen to the Subject, and the Means to introduce an arbitrary Power and Government.* And therefore that Court was taken away, with all the other Courts in that Statute mentioned, have like Juriſdiction.

I don't mention this Statute, as if by the taking away the Court of Star-Chamber, the Remedy for many of the Abuſes or Offences cenſured there, was likewiſe taken away; no, I only intend by it to ſhew, that the People of *England* ſaw clearly the Danger of truſting their Liberties and Properties to be tried, even by the greateſt Men in the Kingdom, without the Judgment of a Jury of their Equals. They had felt the terrible Effects of leaving it to the Judgment of theſe great Men to ſay what was *ſcandalous and ſeditious, falſe or ironical.* And if the Parliament of *England* thought this Power of judging was too great to be truſted with Men of the firſt Rank in the Kingdom, without the Aid of a Jury, how ſacred ſoever their Characters might be, and therefore reſtored to the People their original Right of Tryal by Juries, I hope to be excuſed for inſiſting, that by the Judgment of a Parliament, from whence no Appeal lies, the Jury are the proper Judges, or what is *falſe* at leaſt, if not of what is *ſcandalous and ſeditious.* This is an Authority not to be denied, it is as plain as it is great, and to ſay, that this Act indeed did reſtore to the People Tryals by Juries, which was not the Practice of the Star-Chamber, but that did not give the Jurors any new Authority, or any Right to try Matters of Law, I ſay this Objection will not avail; for I muſt inſiſt, that where Matter of Law is complicated with Matter of Fact, the Jury have a Right to determine both. As for Inſtance; upon Indictment for Murder, the Jury may, and almoſt conſtantly do, take upon them to judge whether the Evidence will amount to Murder or Manſlaughter, and find accordingly; and I muſt ſay I cannot ſee, why in our Caſe the Jury have not at leaſt as good a Right to ſay, Whether our News Papers are a Libel or no Libel, as another Jury has to ſay, whether killing of a Man is Murder or Manſlaughter. The Right of the Jury, to find ſuch a Verdict as they in their Conſcience do think is agreeable to their Evidence, is ſupported by the Authority of *Buſhel's* Caſe, in *Vaughan's Reports, pag.* 135, beyond any doubt. For, in the Argument of

that Case, the Chief Justice who delivered the Opinion of the Court, lays it down for Law, *That in all General Issues, as upon* Non Cul. *in* Trespass, Non Tort. Nul Disseizin *in Assize*, &c. *tho' it is Matter of Law, whether the Defendant is a Trespasser, a Disseizer*, &c. *in the particular Cases in Issue, yet the Jury find not (as in a special Verdict) the Fact of every Case, leaving the Law to the Court; but find for the Plaintiff or Defendant upon the Issue to be tried wherein they resolve both Law and Fact complicately.* It appears by the same Case, that tho' the discreet and lawful Assistance of the Judge, by Way of Advice, to the Jury, may be useful, yet that Advice or Direction ought always to be *upon Supposition, and not positive, and upon Coercion.* The Reason given in the same Book is, *Because the Judge (as Judge) cannot know what the Evidence is which the Jury have*, that is, *he can only know the Evidence given in Court; but the Evidence which the Jury have, may be of their own Knowledge, as they are returned of the Neighbourhood. They may also know from their own Knowledge, that what is sworn in Court is not true; and they may know the Witnesses to be stigmatized, to which the Court may be Strangers.* But what is to my Purpose, is, that suppose that the Court did really know all the Evidence which the Jury know, yet in that Case it is agreed, *That the Judge and Jury may differ in the Result of their Evidence as well as two Judges may*, which often happens. And in *pag.* 148. the Judge subjoins the Reason, why it is no Crime for a Jury to differ in Opinion from the Court, where he says, *That a Man cannot see with another's Eye, nor hear by another's Ear; no more can a Man conclude or infer the thing by another's Understanding or Reasoning.* From all which (I insist) it is very plain, *That the Jury are by Law at Liberty (without any affront to the Judgment of the Court) to find both the Law and the Fact, in our Case*, as they did in the Case I am speaking to, which I will beg leave just to mention, and it was this. Mr. *Penn* and *Mead* being Quakers, and having met in a peaceable Manner, after being shut out of their Meeting-House, preached in *Grace-Church-Street* in *London*, to the People of their own Persuasion, and for this they were indicted; and it was said, *That they with other Persons, to the Number of* 300, *unlawfully and tumultuously assembled, to the Disturbance of the Peace, &c.* To which they pleaded, *Not Guilty.* And the Petit Jury being sworn to try the Issue between the King and the Prisoners, that is, whether they were Guilty, according to the Form of the Indictment? Here there was no Dispute but they were assembled together, to the Number mentioned in the Indictment; But, *Whether that Meeting together was riotously, tumultuously, and to the Disturbance of the Peace?* was the Question. And the Court told the Jury it was, and ordered the Jury to find it so; *For* (said the Court) *the Meeting was the Matter of Fact, and that is confessed, and we tell you it is unlawful, for it is against the Statute; and the Meeting being unlawful, it follows of Course that it was tumultuous, and to the Disturbance of the Peace.* But the Jury did not think fit to take the Courts Word for it, for they could neither find *Riot*, *Tumult*, or any Thing tending to the *Breach of the Peace* committed at that Meeting; and they acquitted Mr. *Penn* and *Mead.* In doing of which they took upon them to judge both the *Law* and the *Fact*, at which the Court (being themselves true Courtiers) were so much offended, that they fined the Jury 40 Marks a piece, and committed them till paid. But Mr. *Bushel*, who valued the Right of a Juryman and the Liberty of his Country more than his own, refused to pay the Fine, and was resolved (tho' at a great Expence and Trouble too) to bring, and did bring, his *Habeas Corpus*, to be relieved from his Fine and Imprisonment, and he was released accordingly; and this being the Judgment in his Case, it is established for Law, *That the Judges, how great soever they be, have no Right to fine, imprison, or punish a Jury for not finding a Verdict according to the Direction of the Court.* And this I hope is sufficient to prove, That Jurymen are to see with their own Eyes, to hear with their own Ears, and to make use of their own Consciences and Understandings, in judging of the Lives, Liberties, or Estates of their Fellow Subjects. And so I have done with this Point.

*Vaughan's Rep. p.* 150.

*pag.* 144

*pag.* 147

This is the second Information for Libelling of a Governor that I have known in *America.* And the first, tho' it may look like a Romance, yet as it is true, I will beg leave to mention it. Governor *Nicholson*, who happened to be offended with one of his Clergy, met him one day upon the Road, and as was usual with him (under the Protection of his Commission) used the poor Parson with the worst of Language, threatned to cut off his Ears, slit his Nose, and at last to shoot him

him though the Head. The Perſon being a reverend Man, continued all this time uncovered in the Heat of the Sun, until he found an Opportunity to fly for it; and coming to a Neighbour's Houſe felt himſelf very ill of a Fever, and immediately writes for a Doctor; and that his Phyſician might the better judge of his Diſtemper, he acquainted him with the Uſage he had received; concluding, that the Governour was certainly mad, for that no Man in his Senſes would have behaved in that manner. The Doctor unhappily ſhews the Parſon's Letter; the Governour came to hear of it, and ſo an Information was preferred againſt the poor Man for ſaying *he believed the Governour was mad*; and it was laid in the Information to be *falſe, ſcandalous and wicked, and wrote with Intent to move Sedition among the People, and bring His Excellency into Contempt*. But by an Order from the late Queen *Anne*, there was a Stop put to the Proſecution, with ſundry others ſet on foot by the ſame Governour, againſt Gentlemen of the greateſt Worth and Honour in that Government.

And may not I be allowed, after all this, to ſay, That by a little Countenance, almoſt any Thing which a Man writes, may, with the Help of that uſeful Term of Art, called an *Innuendo*, be conſtrued to be a Libel, according to Mr. Attorney's Definition of it, That *whether the Words are ſpoke of a Perſon of a publick Character, or of a private Man, whether dead or living, good or bad, true or falſe*, all make a Libel; for according to Mr. Attorney, *after a Man hears a Writing read, or reads and repeats it, or laughs at it, they are all puniſhable*. It is true, Mr. Attorney is ſo good as to allow, *after the Party knows it to be a Libel*, but he is not ſo kind as to take the Man's Word for it.

[Here were ſeveral Caſes put to ſhew, That tho' what a Man writes of a Governour was true, proper and neceſſary, yet according to the foregoing Doctrine it might be conſtrued to be a Libel; But Mr *Hamilton* after the Tryal was over, being informed, That ſome of the Caſes he had put had really happened in this Government, he declared he had never heard of any ſuch; and as he meant no perſonal Reflections, he was ſorry he had mentioned them, and therefore they are omitted here.]

Mr. *Hamilton*, If a Libel is underſtood in the large and unlimited Senſe urged by Mr. Attorney, there is ſcarce a Writing I know that may not be called a Libel, or ſcarce any Perſon ſafe from being called to Account as a Libeller: For *Moſes*, meek as he was, libelled *Cain*; and who is it that has not libelled the Devil? For according to Mr. Attorney, it is no Juſtification to ſay one has a bad Name. *Echard* has libelled our good King *William*; *Burnet* has libelled among many others King *Charles* and King *James*; and *Rapin* has libelled them all. How muſt a man ſpeak or write, or what muſt he hear, read, or ſing? Or when muſt he laugh, ſo as to be ſecure from being taken up as a Libeller? I ſincerely believe, that were ſome Perſons to go thro' the Streets of *New-York* now-a-days, and read a Part of the Bible, if it was not known to be ſuch, Mr. Attorney, with the Help of his *Innuendo's*, would eaſily turn it into a Libel. As for Inſtance, *Iſ.* xi. 16. *The Leaders of the People cauſe them to err, and they that are led by them are deſtroyed*. But ſhould Mr. Attorney go about to make this a Libel, he would read it thus: *The Leaders of the People* [*innuendo*, the Governour and Council of *New-York*] *cauſe them* [*innuendo*, the People of this Province] *to err, and they* [the Governour and Council meaning] *are deſtroyed* [*innuendo*, are deceived into the Loſs of their Liberty] which is the worſt Kind of Diſtruction. Or if ſome Perſons ſhould publickly repeat, in a Manner not pleaſing to his Betters, the 10th and the 11th Verſes of the lvith Chap. of the ſame Book, there Mr. Attorney would have a large Field to diſplay his Skill, in the artful Application of his *Innuendo's*. The Words are, *His Watchmen are all blind, they are ignorant, &c. Yea, they are greedy Dogs, that can never have enough*. But to make them a Libel, there is, according to Mr. Attorney's Doctrine, no more wanting but the Aid of his Skill, in the right adapting his *Innuendo's*. As for Inſtance: *His Watchmen* [*innuendo*, the Governour's Council and Aſſembly] *are blind, they are ignorant*. [*innuendo*, will not ſee the dangerous Deſigns of His Excellency] *Yea, they* [the Governour and Council meaning] *are greedy Dogs, which can never have enough* [*innuendo*, enough of Riches and Power.] Such an Inſtance as this ſeems only fit to laughed at; but I may appeal to Mr. Attorney himſelf, whether theſe are not at leaſt equally proper to be applied to His Excellency and His Miniſters, as ſome of the Inferences and *Innuendo's* in his Information againſt my Client. Then if Mr. Attorney is at Liberty to come into Court,

Court, and file an Information in the King's Name, without leave, who is ſecure, whom he is pleaſed to proſecute as a Libeller? And as the Crown Law is contended for in bad Times, there is no Remedy for the greateſt Oppreſſion of this Sort, even tho' the Party proſecuted is acquitted with Honour. And give me Leave to ſay, as great Men as any in *Britain*, have boldly aſſerted, That the Mode of Proſecuting by Information (when a Grand Jury will not find *Billa vera*) is a national Grievance, and greatly inconſiſtent with that Freedom, which the Subjects of *England* enjoy in moſt other Caſes. But if we are ſo unhappy as not to be able to ward off this Stroke of Power directly, let us take Care not to be cheated out of our Liberties, by Forms and Appearances; let us always be ſure that the Charge in the Information is made out clearly even beyond a Doubt; for tho' Matters in the Information may be called *Form* upon Trial; yet they may be, and often have been found to be *Matters of Subſtance* upon giving Judgment.

*Gentlemen*; The Danger is great, in Proportion to the Miſchief that may happen, through our too great Credulity. A proper Confidence in a Court is commendable; but as the Verdict (whatever it is) will be yours, you ought to refer no Part of your Duty to the Diſcretion of other Perſons. If you ſhould be of Opinion, that there is no Falſhood in Mr. *Zenger*'s Papers, you will, nay (pardon me for the Expreſſion) you ought to ſay ſo; becauſe you don't know whether others (I mean the Court) may be of that Opinion. It is your Right to do ſo, and there is much depending upon your Reſolution, as well as upon your Integrity.

The loſs of Liberty to a generous Mind, is worſe than Death; and yet we know there have been thoſe in all Ages, who for the ſake of Preferment, or ſome imaginary Honour, have freely lent a helping Hand, to oppreſs, nay to deſtroy their Country. This brings to my mind that ſaying of the immortal *Brutus*, when he looked upon the Creatures of *Cæſar*, who were very great Men, but by no Means good Men. "*You* "Romans, *ſaid* Brutus, *if yet I may call you ſo*, "*conſider what you are doing*; *remember that you* "*are aſſiſting* Cæſar *to forge thoſe very Chains*, "*which one day he will make your ſelves wear.*" This is what every Man (that values Freedom) ought to conſider: He ſhould act by Judgment and not by Affection or Self-Intereſt; for, where thoſe prevail, no Ties of either Country or Kindred are regarded, as upon the other Hand, the Man, who loves his Country, prefers its Liberty to all other Conſiderations, well knowing that without Liberty, Life is a Miſery.

A famous Inſtance of this you will find in the Hiſtory of another brave *Roman* of the ſame Name, I mean *Lucius Junius Brutus*, whoſe Story is well known, and therefore I ſhall mention no more of it, than only to ſhew the Value he put upon the Freedom of his Country. After this great Man, with his Fellow Citizens whom he had engag'd in the Cauſe, had baniſh'd *Tarquin* the Proud, the laſt King of *Rome*, from a Throne which he aſcended by inhuman Murders, and poſſeſſed by the moſt dreadful Tyranny and Proſcriptions, and had by this Means amaſs'd incredible Riches, even ſufficient to bribe to his Intereſt, many of the young Nobility of *Rome*, to aſſiſt him in recovering the Crown; but the Plot being diſcovered, and principal Conſpirators were apprehended, among whom were two of the Sons of *Junius Brutus*. It was abſolutely neceſſary that ſome ſhould be made Examples of, to deter others from attempting the reſtoring of *Tarquin*, and deſtroying the Liberty of *Rome*. And to effect this it was, that *Lucius Junius Brutus*, one of the Conſuls of *Rome*, in the Preſence of the *Roman* People, ſat Judge and condemned his own Sons, as Traitors to their Country: And to give the laſt Proof of his exalted Virtue, and his Love of Liberty: He with a Firmneſs of Mind, (only becoming ſo great a Man) caus'd their Heads to be ſtruck off in his own Preſence; and when he obſerv'd that his rigid Virtue, occaſioned a Sort of Horror among the People, it is obſerv'd he only ſaid, "*My Fellow-Citizens, do not think that this pro-* "*ceeds from any Want of natural Affection*; *No*, "*The Death of the Sons of* Brutus *can affect* Bru- "tus *only*; *but the Loſs of Liberty will affect my* "*Country.*" Thus highly was Liberty eſteem'd in thoſe Days that a Father could ſacrifice his Sons to ſave his Country. But why do I go to Heathen *Rome*, to bring Inſtances of the Love of Liberty; the beſt Blood in *Britain* has been ſhed in the Cauſe of Liberty; and the Freedom we enjoy at this Day, may be ſaid to be (in a great Meaſure) owing to the glorious Stand the famous *Hamden*, and others of our Countrymen, made againſt the arbitrary Demands, and illegal Impoſitions, of the Times, in which they lived; Who rather than give up the Rights of *Engliſhmen*, and ſubmit to pay an illegal Tax of no more,

more, I think, than 3 Shillings, resolv'd to undergo, and for the Liberty of their Country, did undergo the greatest Extremities, in that arbitrary and terrible Court of Star-Chamber, to whose arbitrary Proceedings, (it being compos'd of the principal Men of the Realm, and calculated to support arbitrary Government) no Bounds or Limits could be set, nor could any other Hand remove the Evil but a Parliament.

Power may justly be compar'd to a great River, while kept within its due Bounds, is both Beautiful and Useful; but when it overflows its Banks, it is then too impetuous to be stemm'd, it bears down all before it, and brings Destruction and Desolation wherever it comes. If then this is the Natue of Power, let us at least do our Duty, and like wise Men (who value Freedom) use our utmost Care to support Liberty, the only Bulwark against lawless Power, which in all Ages has sacrificed to its wild Lust and boundless Ambition, the Blood of the best Men that ever liv'd.

I hope to be pardon'd, Sir, for my Zeal upon this Occasion: It is an old and wise Caution, *That when our Neighbour's House is on Fire, we ought to take Care of our own.* For tho', blessed be God, I live in a Government where Liberty is well understood, and freely enjoy'd; yet Experience has shewn us all (I'm sure it has to me) that a bad Precedent in one Government, is soon set up for an Authority in another; and therefore I cannot but think it mine, and every Honest Man's Duty, that (while we pay all due Obedience to Men in Authority) we ought at the same Time to be upon our Guard against Power, wherever we apprehend that it may effect Ourselves or our Fellow-Subjects.

I am truly very unequal to such an Undertaking on many Accounts. And you see I labour under the Weight of many Years, and am born down with with great Infirmities of Body; yet Old and Weak as I am, I should think it my Duty, if required, to go to the utmost Part of the Land, where my Service cou'd be of any Use in assisting to quench the Flame of Prosecutions upon Informations, set on Foot by the Government, to deprive a People of the Right of Remonstrating, (and complaining too) of the arbitrary Attempts of Men in Power. Men who injure and oppress the People under their Administration provoke them to cry out and complain; and then make that very Complaint the Foundation for new Oppressions and Prosecutions. I wish I could say there were no Instances of this Kind. But to conclude; the Question before the Court and you, Gentlemen of the Jury, is not of small nor private Concern, it is not the Cause of a poor Printer, nor of *New-York* alone, which you are now trying; No! It may in its Consequence, affect every Freeman that lives under a British Government on the Main of *America*. It is the best Cause. It is the Cause of Liberty; and I make no Doubt but your upright Conduct, this Day, will not only entitle you to the Love and Esteem of your Fellow-Citizens; but every Man, who prefers Freedom to a Life of Slavery, will bless and honour You; as Men who have baffled the Attempt of Tyranny; and by an impartial and uncorrupt Verdict, have laid a noble Foundation for securing to ourselves, our Posterity, and our Neighbours, That to which Nature and the Laws of our Country have given us a Right, —— The Liberty —— both of exposing and opposing arbitrary Power (in these Parts of the World, at least) by speaking and writing Truth.

*Here Mr. Attorney observ'd, that Mr.* Hamilton *had gone very much out of the Way, and had made himself and the People very merry: But that he had been citing Cases, not at all to the Purpose; he said, there was no such Cause as Mr.* Bushel's *or Sir* Edward Hale's *before the Court; and he could not find out what the Court or Jury had to do with Dispensations, Riots, or unlawful Assemblies: All that the Jury had to consider of, was Mr.* Zenger's *Printing and Publishing two scandalous Libels, which very highly reflected on his Excellency and the principal Men concern'd in the Administration of this Government, which is confess'd. That is, the Printing and Publishing of the Journals set forth in the Information is confess'd. And concluded; that as Mr.* Hamilton *had confess'd the Printing, and there could be no doubt but they were scandalous Papers, highly reflecting upon his Excellency, and the principal Magistrates in the Province. And therefore he made no doubt but the Jury would find the Defendant Guilty, and would refer to the Court for their Direction.*

*Mr. Ch. Just.* Gentlemen of the Jury. The great Pains Mr. *Hamilton* has taken, to shew how little Regard Juries are to Pay to the Opinion of the Judges; and his insisting so much upon the Conduct of some Judges in Tryals of this kind; is done, no doubt, with a Design that

you ſhould take but very little Notice of what I may ſay upon this Occaſion. I ſhall therefore only obſerve to you that, as the Facts or Words in the Information are confeſſed: The only Thing that can come in Queſtion before you is, Whether the Words, as ſet forth in the Information, make a Libel. And that is a Matter of Law, no doubt, and which you may leave to the Court. But I ſhall trouble you no further with any Thing more of my own, but read to you the Words of a learned and upright Judge * in a Caſe of the like Nature.

'*To ſay that corrupt Officers are appointed to adminiſter Affairs, is certainly a Reflection on the Government. If People ſhould not be called to account for poſſeſſing the People with an ill Opinion of the Government, no Government can ſubſiſt. For it is neceſſary for all Governments that the People ſhould have a good Opinion of it. And nothing can be worſe to any Government, than to endeavour to procure Animoſities; as to the Management of it, this has been always look'd upon as a Crime, and no Government can be ſafe without it be puniſhed.*

'*Now you are to Conſider, whether theſe Words I have read to you, do not tend to beget an Ill Opinion of the Adminiſtration of the Government? To tell us, that thoſe that are employed know nothing of the Matter, and thoſe that do know are not employed. Men are not adapted to Offices, but Offices to Men, out of a particular Regard to their Intereſt, and not to their Fitneſs of the Places; this is the Purport of theſe Papers.*'

Mr. *Hamilton*, I humbly beg Your Honour's Pardon; I am very much miſ-apprehended, if you ſuppoſe what I ſaid was ſo deſigned.

Sir, you know, I made an Apology for the Freedom I found my ſelf under a Neceſſity of uſing upon this Occaſion. I ſaid, there was Nothing perſonal deſigned; it aroſe from the Nature of our Defence.

The Jury withdrew, and in a ſmall Time returned, and being asked by the Clerk, Whether they were agreed of their Verdict, and whether *John Peter Zenger* was guilty of Printing and Publiſhing the Libels in the Information mentioned? They anſwered by *Thomas Hunt*, their Foreman, *Not Guilty*. Upon which there were three Huzzas in the Hall which was crowded with People, and the next Day I was diſcharged from my Impriſonment.

* Ch. J. *Holt* in *Tutchin*'s Caſe.

# APPENDIX.

City of *New-York*. } *ſs.* At a Common-Council, held at the City-Hall of the ſaid City, on *Tueſday* the Sixteenth Day of *September*, Anno Dom 1735.

PRESENT.

*Paul Richards*, Eſq; Mayor.
*Gerardus Stuyveſant*, Eſq; Deputy-Mayor.
*Daniel Horſmanden*, Eſq; Recorder.

ALDERMEN.

*William Roome*, Eſq;
*Simon Johnſon*, Eſq;
*John Walter*, Eſq;
*Chriſtopher Fell*, Eſq;
*Stephen Bayard*, Eſq;
*Johannes Burger*, Eſq;

ASSISTANTS.

Mr. *Johannes Waldron*,
Mr. *Ede Myer*,
Mr. *John Moore*,
Mr. *John Fred*,
Mr. *Charles Le Roux*,
Mr. *Evert Byvanck*,

Ordered, *That* Andrew Hamilton, *Eſq; of* Philadelphia, *Barriſter at Law, be preſented with the Freedom of this Corporation: and that Alderman* Bayard, *Alderman* Johnſon, *and Alderman* Fell, *be a Committee to bring in a Draught thereof.*

City of *New-York*. } *ſs.* At a Common-Council, held at the City-Hall of the ſaid City on *Monday* the Twenty Ninth Day of *September*, being the Feaſt Day of St. *Michael* the Archangel, *Anno Dom.* 1735.

PRESENT.

*Paul Richards*, Eſq; Mayor.
*Daniel Horſmanden*, Eſq; Recorder.

ALDERMEN.

*William Rome*, Eſq;
*Simon Johnſon*, Eſq;
*John Walter*, Eſq:
*Chriſtopher Fell*, Eſq;
*Stephen Bayard*, Eſq;
*Johannes Burger*, Eſq;

ASSISTANTS.

Mr. *Johannes Waldron*, Mr. *Evert Byvank*,
Mr. *John Fred*, Mr. *Henry Bogert*,
Mr. *Charles Le Roux*,

Stephen Bayard, Simon Johnſon *and* Chriſtopher Fell, Eſqrs. *Aldermen, to whom it was referred to prepare the Draught of the Freedom of this Corporation, to be preſented to* Andrew Hamilton *Eſq; make the Report thereon, in the Words following* (to wit) *That they have prepared the Form of the Grant, to the ſaid* Andrew Hamilton, *Eſq; of the Freedom of the City of* New-York, *in theſe Words* (to wit.)

City of *New-York*. ſs. *PAUL RICHARDS* Eſq; the Recorder, Aldermen, and Aſſiſtants of the City of *New-York*, convened in Common-Council, To all to whom theſe Preſents ſhall come Greeting. *WHEREAS*, Honour is the juſt Reward of Virtue, and public Benefits demand a publick Acknowledgment. We therefore, under a grateful Senſe of the remarkable Service, done to the Inhabitants of this City and Colony, by *Andrew Hamilton* Eſq; of *Penſilvania*, Barriſter at Law, by his learned and generous Defence of the Rights of Mankind, and in the Liberty of the Preſs, in the Caſe of *John Peter Zenger*, lately tried on an Information exhibited in the Supream-Court of this Colony, do by theſe Preſents, bear to the ſaid *Andrew Hamilton* Eſq; the public Thanks of the Freemen of this Corporation for that ſignal Service, which he chearfully undertook under great Indiſpoſition of Body, and generouſly performed, refuſing any Fee or Reward: And in Teſtimony of our great Eſteem for his Perſon, and Senſe of his Merit, do hereby preſent him with the Freedom of this Corporation. Theſe are therefore to Certify and Declare, that the ſaid *Andrew Hamilton* Eſq; is hereby admitted, received, and allowed a Freedom and Citizen of the ſaid City: To Have, Hold, Enjoy and Partake of all the Benefits, Liberties, Priviledges, Freedoms, and Immunities whatſoever, granted or belonging to a Freeman and Citizen of the ſame City. *In Teſtimony* whereof, the Common-Council of the ſaid City, in Common-Council aſſembled, have cauſed the Seal of the ſaid City to be hereunto affixed this twenty ninth Day of *September, Anno Domini One Thouſand Seven Hundred and Thirty Five.*

By Order of the Common-Council.
*William Sharpas*, Clerk.

*And we do further Report, that ſundry of the Members of this Corporation and Gentlemen of this City have voluntarily Contributed ſufficient for a Gold Box of five Ounces and a half, for Incloſing the Seal of the ſaid Freedom; Upon the Lid of which, we are of Opinion ſhould be engraved the Arms of the City of* New-York: *Witneſs Our Hands this twenty ninth Day of* September, 1735.
Stephen Bayard.
Simon Johnſon.
Chriſtopher Fell.

*Which Report is approved by this Court, and* Ordered, *That the Freedom and Box be forthwith made, purſuant to the ſaid Report, and that Mr.* Sharpas, *the Common Clerk of this City, do affix the Seal of the ſame Freedom, and incloſe it in the ſaid Box.*

Mr. Alderman *Bayard going to* Philadelphia, *and offering to be the Bearer of the ſaid Freedom to Mr.* Hamilton, Ordered, *That Mr.* Sharpas *deliver it to Alderman* Bayard *for that Purpoſe; and that Alderman* Bayard *do deliver it to Mr.* Hamilton, *with Aſſurances of the great Eſteem that this Corporation have for his Perſon and Merit.*

City of *New-York*. ſs. At a Common-Council, held at the City-Hall of the ſaid City, on *Wedneſday* the fifteenth Day of *October*, Anno Domini 1735.

PRESENT.

*Paul Richards*, Eſq; Mayor.
*Daniel Horſmanden*, Eſq; Recorder.

ALDERMEN.

*John Walter*, Eſq; *William Roome*, Eſq;
*Simon Johnſon*, Eſq; *Johannes Burger*, Eſq;

ASSISTANTS.

Mr. *Johannes Waldron*, Mr. *Peter Stoutenburgh*,
Mr *Abraham De Peyſter*, Mr. *Henry Bogert*,
Mr. *Gerrardus Beekman*,

Ordered, *That the Freedom, granted by this Corporation, to* Andrew Hamilton, *Eſq; with the Report of the Committee, for preparing a Draught of the ſame, and the Order of this Court, thereon, may be printed.* William Sharpas.

Round on the Lid of the Box, mentioned in the aboveſaid Report and Order, there is ingraved

ont

not only the the Arms of the City of *New-York*, but alſo this Motto in a Garter;

DEMERSÆ LEGES - TIMEFACTA LIBERTAS - HÆC TANDEM EMERGUNT.

On the inner Side of the Lid of the Box ſhewing it ſelf at the ſame Time with the Certificate of the Freedom; there is Engraven in a flying Garter, theſe Words,

NON NUMMIS, - VIRTUTE PARATUR.

As an Incentive to public Virtue, on the Front of the Rim of the ſaid Box, there is engraven a Part of *Tully's* Wiſh;

ITA CUIQUE EVENIAT, UT DE REPUBLICA MERUIT.

Which Freedom and Box was preſented in the Manner that had been directed, and gratefully accepted by the ſaid *Andrew Hamilton*, Eſq:

*FINIS.*